

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

JOSEPH J. BELILE,

Plaintiff,

v.

Civ. Action No.
9:11-CV-0092 (TJM/DEP)

C.O. GRIFFIN, *et al.*,

Defendants.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF:

JOSEPH J. BELILE, *Pro Se*
08-A-3707
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

FOR DEFENDANTS:

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DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

REPORT AND RECOMMENDATION

Pro se plaintiff Joseph J. Belile, a New York State prison inmate, has commenced this action against several corrections employees stationed at the facility in which he was housed at the relevant times, including its superintendent, pursuant to 42 U.S.C. § 1983, complaining of multiple violations of his civil rights. In his amended complaint, plaintiff alleges that, as a result of being denied his request for placement into protective custody, he was attacked by a fellow inmate. Belile also alleges that some of the named-defendants encouraged other inmates to attack him, and that he was assaulted by other named-defendants on two separate occasions.

Currently pending before the court in connection with this action is a motion by the defendants for the entry of summary judgment dismissing plaintiff's amended complaint. Defendants base their motion on (1) plaintiff's alleged failure to exhaust his administrative remedies before commencing suit, (2) their contention that plaintiff's claims fail on the merits, and (3) in the alternative, their claim of entitlement to qualified immunity. For the reasons set forth below, I recommend that plaintiff's amended complaint be dismissed for failure

to exhaust available administrative remedies.

I. BACKGROUND¹

Plaintiff Joseph Belile is a prison inmate currently being held in the custody of the New York State Department of Corrections and Community Supervision (“DOCCS”). Am. Compl. (Dkt. No. 37) at 1. Although now confined elsewhere, at the times relevant to this action, plaintiff was held in keeplock confinement at the Great Meadow Correctional Facility (“Great Meadow”), a maximum security prison located in Comstock, New York.² Plf.’s Dep. Tr. (Dkt. No. 55, Attach. 2)

¹ Although plaintiff opposed defendants’ motion for summary judgment, he did not file an opposition to defendants’ Local Rule 7.1 statement of material facts that complies with Local Rule 7.1(a)(3). Specifically, defendants filed an eleven-page statement of material facts that contains eighty-two paragraphs and complies with the citation requirements of Local Rule 7.1(a)(3). Defs.’ L.R. 7.1 Statement (Dkt. No. 55, Attach. 18). In response, plaintiff filed a two-page statement of material facts that contains only five paragraphs, neither admits nor denies any of the paragraphs contained in defendants’ statement of material facts, and fails to cite to any record evidence. Dkt. No. 57 at 6-7. Plaintiff was warned of the consequences of failing to properly respond to defendants’ statement of material facts. Dkt. No. 56, Attach. 1. The court therefore accepts defendants’ facts to the extent that they are supported by accurate citations to the record. See N.D.N.Y. L.R. 7.1(a)(3) (“The Court shall deem admitted any properly supported facts set forth in the Statement of Material Facts that the opposing party does not specifically controvert.” (emphasis in original)); see also, e.g., *Elgamil v. Syracuse Univ.*, No. 99-CV-0611, 2000 WL 1264122, at *1 (N.D.N.Y. Aug. 22, 2010) (McCurn, J.) (listing cases and deeming all of the facts asserted in the defendant’s statement of material facts as admitted where the plaintiff did not specifically admit or deny any of the assertions and “failed to contain a single citation to the record”).

² “Keeplock” is a form of confinement through which an “inmate is confined to his cell, deprived of participation in normal prison routine, and denied contact with other inmates.” *Gittens v. LeFevre*, 891 F.2d 38, 39 (2d Cir. 1989), *accord*,

at 18; Kelly Decl. (Dkt. No. 55, Attach. 9) at ¶ 1. Upon his arrival at Great Meadow, plaintiff was assigned to a cell located on the fourth tier of the B-block, a housing unit comprised of four floors of cells, all of which are oriented in the same direction and face an open area. Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 18.

On or about April 23 or 24, 2009, while in his cell on B-block, Belile overheard two inmates yelling that he would be killed if he came out of his cell. Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 19-20.

Although plaintiff was not able to identify any of the inmates involved because of the orientation of the cells in B-block, he believes that the threats came from one floor below his cell. *Id.* at 19, 85-86. The next day, plaintiff wrote letters to defendant Charles F. Kelly, Jr., the Deputy Superintendent of Security at Great Meadow, and the B-block sergeant, requesting that he be placed in protective custody ("PC"). *Id.* at 16, 19;

Warburton v. Goord, 14 F. Supp. 2d 289, 293 (W.D.N.Y. 1998); *Tinsley v. Greene*, No. 95-CV-1765, 1997 WL 160124, at *2 n.2 (N.D.N.Y. Mar. 31, 1997) (Pooler, J., adopting report and recommendation by Homer, M.J.) (citing *Green v. Bauvi*, 46 F.3d 189, 192 (2d Cir. 1995)). "The most significant difference between keeplock and general population inmates is that the former do not leave their cells for out-of-cell programs unless they are a part of mandatory educational programs and general population inmates spend more time out of their cells on weekends." *Lee v. Coughlin*, 26 F. Supp. 2d 615, 628 (S.D.N.Y. 1998). Although, as a keeplocked inmate, plaintiff was entitled to leave his cell for one hour each day for the purpose of exercise, *Lee*, F. Supp. 2d at 628, he did not avail himself of that opportunity. Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 51-52.

Am. Compl. (Dkt. No. 37) at 9; Kelly Decl. (Dkt. No. 55, Attach. 9) at ¶ 8; Kelly Decl. Exh. A (Dkt. No. 55, Attach. 10). That same day, defendant Kelly assigned defendant Donald Maguire, a corrections sergeant at the facility, to investigate the matter. Kelly Decl. (Dkt. No. 55, Attach. 9) at ¶ 9.

After receiving the assignment to review plaintiff's PC request and obtaining relevant background information, defendant Maguire interviewed Belile on the evening of April 27, 2009. Maguire Decl. (Dkt. No. 55, Attach. 12) at ¶¶ 5, 8. During that interview, plaintiff was unable to provide specific information to support his belief that he was in danger, or to identify any inmate at Great Meadow that might want to harm him.³ *Id.* at ¶¶ 9-10; Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 23-25. Finding no basis to conclude that plaintiff faced a credible threat to his safety, defendant Maguire denied plaintiff's request for PC, had him returned to his keeplock cell, and prepared a report to defendant Kelly concerning the results of his investigation. Maguire Decl. (Dkt. No. 55, Attach. 12) at 2; Kelly Decl. (Dkt. No. 55, Attach. 9) at ¶ 10; Kelly Decl.

³ Although Belile named two inmates, defendant Maguire determined that neither was presently confined at Great Meadow. Maguire Decl. (Dkt. No. 55, Attach. 12) at ¶ 9.

Exh. B (Dkt. No. 55, Attach. 11); Plaintiff's Dep. Tr. (Dkt. No. 55, Attach. 2) at 26, 29.

Upon completion of the interview by defendant Maguire, plaintiff was escorted back to his B-block cell by a corrections officer identified by him as defendant Griffin, a corrections officer at Great Meadow. Am. Compl. (Dkt. No. 37) at 10; Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 29. When plaintiff arrived at the foot of the stairs leading to his fourth-floor cell, he dropped the bags that he was carrying "to catch [his] breath." Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 31. At that moment, defendant Griffin asked plaintiff what he was convicted of that resulted in his incarceration, and, when plaintiff answered him, defendant Griffin kicked plaintiff in the left thigh area and told him to move up the stairs. *Id.* at 31. Plaintiff felt what he describes as a sharp pain for a few moments after being kicked by the corrections officer, but the pain subsided by later that night, and he never sought medical treatment for the injury. *Id.* at 33.

On or about April 27, 2009, the day after plaintiff's interview with defendant Maguire, defendant Murphy, a corrections officer assigned to supervise B-block inmates' transit to the Great Meadow mess hall for

breakfast, stated to his accompanying officer, defendant John Doe #1, when reaching plaintiff's cell for escort, "Belile B-4-29 is a rapo and he tried to sign into PC last night." Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 33-34; Am. Compl. (Dkt. No. 37) at 10. Plaintiff claims that, while defendant Murphy pretended to direct that statement to defendant John Doe #1 standing next to him, he actually said it loud enough so that other inmates could hear him as well. Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 34-35. Later on April 28, 2009, after the evening meal, an unknown inmate screamed out "29 Cell tried to sign into PC. He's a rat. We'll get him when he comes out." *Id.* at 21-22.

On May 1, 2009, while plaintiff was watching television, another inmate splashed a hot liquid into his cell, causing him to suffer burns that required medical treatment. Am. Compl. (Dkt. No. 37) at 10; Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 44-47. After receiving treatment for his injuries, plaintiff was escorted to PC, which is located on the D-block of Great Meadow. Am. Compl. (Dkt. No. 37) at 10; Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 53-55.

Following his arrival in PC, plaintiff received four bags of personal property from defendants Dimick and Brockley, two other corrections

officers at the facility, both of whom were known to plaintiff from an earlier period in 2006 when plaintiff was confined in a Behavioral Health Unit program at Great Meadow. Am. Compl. (Dkt. No. 37) at 10-11; Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 56-59. After delivering plaintiff's property, defendants Dimick and Brockley kicked plaintiff in the genitals and punched him in the head. Am. Compl. (Dkt. No. 37) at 11; Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 61. The officers then threw the four property bags at plaintiff and left his cell. Am. Compl. (Dkt. No. 37) at 11; Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 62. Plaintiff did not seek medical treatment for the injuries resulting from the actions of defendants Dimick and Brockley. Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 62.

Within a couple of days of arriving in PC, plaintiff wrote a grievance and placed it in the meal slot of his cell gate to be picked up by a corrections officer. Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 64, 66. The grievance was, in fact, picked up, but plaintiff does not know precisely who retrieved it. *Id.* at 66, 67. On or about May 20, 2009, after plaintiff did not receive a response to his first grievance, he wrote a second grievance, which again was picked up from his meal slot by

an unknown individual. *Id.* at 66, 67. Plaintiff did not receive a response to the second grievance. *Id.* at 66. Other mail that plaintiff placed in his meal slot to be sent out while he was in PC did reach its destination. *Id.* at 69-70. There is no DOCCS record of plaintiff filing these two grievances, nor is there a record that plaintiff appealed any grievance relating to the matters now in issue to the relevant appellate entity within DOCCS. Hoagland Decl. (Dkt. No. 55, Attach. 15) at ¶ 8; Hale Decl. (Dkt. No. 55, Attach. 14) at ¶ 9.

II. PROCEDURAL HISTORY

Plaintiff commenced this action on January 26, 2011. Complaint (Dkt. No. 1). Following a period of pretrial discovery, during which plaintiff attempted to identify the defendants previously sued only as “Doe” defendants, he filed an amended complaint on November 8, 2011. Am. Compl. (Dkt. No. 37). Plaintiff’s amended complaint names, as defendants, Great Meadow Superintendent Bezio;⁴ Great Meadow Deputy Superintendent of Security Kelly; Corrections Sergeant Maguire; and Corrections Officers Griffin, Murphy, Dimick, Brockley,

⁴ While Norman Bezio is named by Belile as a defendant, and is identified as the superintendent at the facility in issue, during his deposition, Belile acknowledged that Bezio was not in fact the superintendent at any time relevant to the events giving rise to this action. Plf.’s Dep. Tr. (Dkt. No. 55, Attach. 2) at 90.

and defendant “John Doe #1.” *Id.* at 2-3. Construed with the utmost liberality, plaintiff’s amended complaint asserts a due process claim under the Fourteenth Amendment, and excessive force, failure to protect, and deliberate indifference claims under the Eighth Amendment, all pursuant to 42 U.S.C. § 1983. *Id.* at 12-13.

On May 31, 2012, following the completion of discovery, defendants filed a motion for summary judgment seeking dismissal of plaintiff’s amended complaint based on several grounds, generally arguing that plaintiff failed to exhaust his administrative remedies, that plaintiff’s amended complaint fails on the merits, and, alternatively, that all defendants are entitled to qualified immunity. Defs.’ Memo. of Law (Dkt. No. 55, Attach. 19) at 4-17. On June 7, 2012, plaintiff filed his opposition to that motion, Plf.’s Resp. (Dkt. No. 56), and defendants subsequently filed their reply on June 14, 2012, Defs.’ Reply (Dkt. No. 58).

Defendants’ motion, which is now fully briefed and ripe for determination, has been referred to me for the issuance of a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local 72.3(c). See Fed. R. Civ. P. 72(b).

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment motions are governed by Rule 56 of the Federal Rules of Civil Procedure. Under that provision, the entry of summary judgment is warranted “if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 82-83 (2d Cir. 2004). A fact is “material” for purposes of this inquiry, if it “might affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248; see also *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson*). A material fact is genuinely in dispute “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

A party moving for summary judgment bears an initial burden of demonstrating that there is no genuine dispute of material fact to be decided with respect to any essential element of the claim in issue, and

the failure to meet this burden warrants denial of the motion.

Anderson, 477 U.S. at 250 n.4; *Sec. Ins. Co.*, 391 F.3d at 83. In the event this initial burden is met, the opposing party must show, through affidavits or otherwise, that there is a material dispute of fact for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 250.

When deciding a summary judgment motion, a court must resolve any ambiguities, and draw all inferences, in a light most favorable to the nonmoving party. *Jeffreys*, 426 F.3d at 553; *Wright v. Coughlin*, 132 F.3d 133, 137-38 (2d Cir. 1998). The entry of summary judgment is justified only in the event of a finding that no reasonable trier of fact could rule in favor of the non-moving party. *Bldg. Trades Employers' Educ. Ass'n v. McGowan*, 311 F.3d 501, 507-08 (2d Cir. 2002); see also *Anderson*, 477 U.S. at 250 (finding summary judgment appropriate only when "there can be but one reasonable conclusion as to the verdict").

B. Failure to Exhaust

Defendants argue that plaintiff is precluded from pursuing his claims in this action as a result of his failure to exhaust available administrative remedies before filing suit. Defs.' Memo. of Law (Dkt. No. 55, Attach. 19) at 4-5. In support, defendants offer declarations from Jeffrey Hale, Assistant Director of the DOCCS Inmate Grievance Program ("IGP"), and Jason Hoagland, Acting IGP Supervisor at Great Meadow. Dkt. No. 55, Attachs. 14, 15. Hale avers that, based upon a search of available DOCCS records, plaintiff did not, in accordance with the available grievance procedures in place at Great Meadow while plaintiff confined there, pursue an appeal to the DOCCS Central Office Review Committee ("CORC") related to the denial of plaintiff's request to be placed in PC. Hale Decl. (Dkt. No. 55, Attach. 14) at ¶ 9. Similarly, Hoagland avers that a search of the grievance records at Great Meadow does not reveal any grievance filed by plaintiff "at any time." Hoagland Decl. (Dkt. No. 55, Attach. 15) at ¶ 8. In response, plaintiff argues that "there is not any available administrative remedie[s] when an assault and harm have already occurred," and that the exhaustion requirement only applies to "'prison conditions' under the

P.L.R.A.,” which plaintiff is not challenging. Plf. Resp. (Dkt. No. 57) at ¶ 2.

1. Legal Principles Governing Exhaustion

The Prison Litigation Reform Act of 1996 (“PLRA”), Pub. L. No. 104-134, 110 Stat. 1321 (1996), which imposes restrictions on the ability of prisoners to maintain federal civil rights actions, expressly requires that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a); see also *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (“Exhaustion is . . . mandatory. Prisoners must now exhaust all ‘available’ remedies[.]” (internal citations omitted)); *Hargrove v. Riley*, No. 04-CV-4587, 2007 WL 389003, at *5 (E.D.N.Y. Jan. 31, 2007) (“The exhaustion requirement is a mandatory condition precedent to any suit challenging prison conditions, including suits brought under Section 1983.”).⁵ “[T]he PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general

⁵ Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff.

circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002).⁶

In the event the defendant establishes that the inmate-plaintiff failed “to fully complete[] the administrative review process” prior to commencing the action, the plaintiff’s complaint is subject to dismissal. *Pettus v. McCoy*, No. 04-CV-0471, 2006 WL 2639369, at *1 (N.D.N.Y. Sept. 13, 2006) (McAvoy, J.); see also *Woodford*, 548 U.S. at 93 (“[W]e are persuaded that the PLRA exhaustion requirement requires proper exhaustion.”). “Proper exhaustion” requires a plaintiff to procedurally exhaust his claims by “compl[ying] with the system’s critical procedural rules.”⁷ *Woodford*, 548 U.S. at 95; see also *Macias v. Zenk*, 495 F.3d 37, 43 (2d Cir. 2007) (citing *Woodford*).

In accordance with the PLRA, the DOCCS has made the IGP

⁶ In this case, the Supreme Court’s decision in *Porter* effectively forecloses plaintiff’s argument that claims of the past-use of excessive force are not subject to the exhaustion requirement. *Porter*, 534 U.S. at 532.

⁷ While placing prison officials on notice of a grievance through less formal channels may constitute claim exhaustion “in a substantive sense,” in order to satisfy the PLRA, an inmate-plaintiff nonetheless must meet the procedural requirement of exhausting his available administrative remedies by complying with the grievance procedures in place at the relevant correctional facility. *Macias v. Zenk*, 495 F.3d 37, 43 (2d Cir. 2007) (quoting *Johnson v. Testman*, 380 F.3d 691, 697-98 (2d Cir. 2004) (emphasis omitted)).

available to inmates, which is comprised of a three-step procedure that inmates must use when they have a grievance regarding prison conditions. 7 N.Y.C.R.R. § 701.5; *Mingues v. Nelson*, No. 96-CV-5396, 2004 WL 234898, at *4 (S.D.N.Y. Feb. 20, 2004). The IGP procedure is accurately described in Hale's declaration, Dkt. No. 55, Attach. 14, and embodied in 7 N.Y.C.R.R. § 701. Under the IGP, an inmate must first file a complaint with the facility's IGP clerk within twenty-one days of the alleged occurrence. 7 N.Y.C.R.R. § 701.5(a)(1). If a grievance complaint form is not readily available, a complaint may be submitted on plain paper. *Id.* A representative of the facility's inmate grievance resolution committee ("IGRC") has up to sixteen days after the grievance is filed to informally resolve the issue. *Id.* at § 701.5(b)(1). If there is no such informal resolution, then the full IGRC conducts a hearing within sixteen days after receipt of the grievance. *Id.* at § 701.5(b)(2).

A grievant may then appeal the IGRC's decision to the facility's superintendent within seven days after receipt of the IGRC's written decision. *Id.* at § 701.5(c). The superintendent must issue a written decision within a certain number of days of receipt of the grievant's

appeal.⁸ *Id.* at § 701.5(c)(i), (ii).

The third and final step of the IGP involves an appeal to the CORC, which must be taken within seven days after receipt of the superintendent's written decision. *Id.* at § 701.5(d)(1)(i). The CORC is required to render a written decision within thirty days of receipt of the appeal. *Id.* at § 701.5(d)(2)(i).

Accordingly, at each step of the IGP process, a decision must be entered within a specified time period. Significantly, “[a]ny failure by the IGRC or the superintendent to timely respond to a grievance or first-level appeal, respectively, can - and must - be appealed to the next level, including CORC, to complete the grievance process.” *Murray v. Palmer*, No. 03-CV-1010, 2010 WL 1235591, at *2 (N.D.N.Y. Mar. 31, 2010) (Hurd, J. adopting report and recommendation by Lowe, M.J.) (citing, *inter alia*, 7 N.Y.C.R.R. § 701.6(g)(2)).

Generally speaking, if a plaintiff fails to follow each of the required three steps of the above-described procedure prior to commencing litigation, he has failed to exhaust his administrative remedies. See

⁸ Depending on the type of matter complained of by the grievant, the superintendent has either seven or twenty days after receipt of the grievant's appeal to issue a decision. *Id.* at § 701.5(c)(i), (ii).

Ruggerio v. County of Orange, 467 F.3d 170, 176 (2d Cir. 2006) (“[T]he PLRA requires proper exhaustion, which means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).” (internal quotation marks omitted)).

2. Application of Legal Principles

Initially, the court notes that plaintiff alleges that he only filed two grievances on or about May 2, 2009, and May 20, 2009, both of which, when liberally construed, complain that, as a result of denials by defendants Maguire and Kelly of his request to be placed in PC, he was assaulted by another inmate. Am. Compl. (Dkt. No. 37) at 5-6. The grievances also complain that defendants Murphy and Doe improperly disclosed to other inmates that plaintiff was convicted of rape in the third degree, and allege that defendants Dimick and Brockley assaulted plaintiff immediately after arriving in PC. *Id.* Because these two grievances do not include any complaints about defendant Griffin’s assault on plaintiff when he escorted plaintiff back from defendant Maguire’s office, and because there is no record evidence that plaintiff ever filed a grievance as it relates to this allegation, I find that plaintiff failed to exhaust his available administrative remedies regarding any

excessive force claim against defendant Griffin, in violation of the Eighth Amendment. However, because each of the other named-defendants are implicated in plaintiff's grievances, the court proceeds to discuss whether plaintiff exhausted available administrative remedies as it relates to the claims asserted against the remaining named-defendants.

After carefully reviewing the record evidence, I find that there is a dispute of fact as to whether plaintiff actually filed a grievance with the IGP clerk that relates to any of the allegations giving rise to this action.⁹ Specifically, plaintiff's amended complaint alleges that, while he filed two grievances, both were intercepted by correctional officers at Great Meadow. Am. Compl. (Dkt. No. 37) at 3. Similarly, at his deposition, plaintiff testified that he placed two written grievances in his meal slot to be filed by corrections officers. Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 66-67. According to plaintiff, after a corrections officer retrieves a grievance from an inmate, the grievance is supposed to be forwarded to the appropriate officials. Am. Compl. (Dkt. No. 37) at 3. However,

⁹ As will be discussed more completely below, however, because Belile failed to pursue the alleged grievance to completion, this fact is not material in that it does not preclude the entry of summary judgment against him on this issue.

Hoagland, the Acting IGP Supervisor at Great Meadow, avers that a search of the grievance records at Great Meadow does not reveal any grievance filed by plaintiff “at any time.” Hoagland Decl. (Dkt. No. 55, Attach. 15) at ¶ 8. Moreover, Hale, the DOCCS IGP Assistant Director, states that a search of the relevant DOCCS records shows that plaintiff did not file an appeal to CORC arising from any incident while at Great Meadow. Hale Decl. (Dkt. No. 55, Attach. 14) at ¶ 9. These conflicting pieces of evidence demonstrate that there is a dispute of fact as to whether plaintiff initiated the IGP process at Great Meadow by filing a grievance relating to the allegations giving rise to this action.

Whether or not plaintiff did attempt to lodge grievances in accordance with the IGP, however, is immaterial because there is no dispute that he failed to “properly exhaust” his administrative remedies by complying with the IGP’s requirement that he appeal any denial to the superintendent of the facility, and then appeal any unfavorable decision from the superintendent to CORC. *Woodford*, 548 U.S. at 95; *Ruggerio*, 467 F.3d at 176. Plaintiff does not argue, nor does he offer any proof in his amended complaint, at his deposition, or in opposition to defendants’ motion for summary judgment, that he pursued his

grievances to completion. For this reason, I find that no reasonable factfinder could conclude that plaintiff exhausted available administrative remedies as it relates to any of the allegations giving rise to this action. See *Goodson v. Silver*, No. 09-CV-0494, 2012 WL 4449937, at *4 (N.D.N.Y. Sept. 25, 2012) (Suddaby, J.) (“[I]f a prisoner has failed to follow each of the required . . . steps for the . . . grievance procedure prior to commencing litigation, he has failed to exhaust his administrative remedies.”).

Despite finding that plaintiff did not file and pursue to completion a grievance regarding the claims he now raises in this action, the exhaustion inquiry is not ended. In a series of decisions rendered since the enactment of the PLRA, the Second Circuit has crafted a three-part test for determining whether dismissal of an inmate plaintiff’s complaint is warranted for failure to satisfy the PLRA’s exhaustion requirement.¹⁰ *Macias*, 495 F.3d at 41; *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004). Under the Second Circuit’s test, a court must first determine

¹⁰ Whether the Second Circuit’s test in *Hemphill* survives following the Supreme Court’s decision in *Woodford* has been a matter of some speculation. See, e.g., *Newman v. Duncan*, No. 04-CV-0395, 2007 WL 2847304, at *2 n.4 (N.D.N.Y. Sept. 26, 2007) (McAvoy, J., adopting report and recommendation by Homer, M.J.) .

whether administrative remedies were available to the plaintiff at the relevant times. *Macias*, 495 F.3d at 41; *Hemphill*, 380 F.3d at 686. If such remedies were available to the plaintiff, the court must next examine “whether the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it, or whether the defendants’ own actions inhibiting the inmate’s exhaustion of remedies may estop one or more of the defendants from raising the plaintiff’s failure to exhaust defense.” *Hemphill*, 380 F.3d at 686, *accord*, *Macias*, 495 F.3d at 41. Finally, in the event the proffered defense survives these first two levels of scrutiny, the court must examine whether special circumstances “have been plausibly alleged” to justify the plaintiff’s failure to comply with the applicable administrative procedural requirements.¹¹ *Id.*

¹¹ Though distinct in theory, in practice, the application of the three prongs of the prescribed test admit of overlap. *Giano v. Goord*, 380 F.3d 670, 677 n.6 (2d Cir. 2004); *see also Hargrove v. Riley*, No. CV-04-4587, 2007 WL 389003, at *8 n.14 (E.D.N.Y. Jan. 31, 2007) (“Case law does not clearly distinguish between situations in which defendants’ behavior renders administrative remedies ‘unavailable’ to the plaintiff and cases in which defendants are estopped from asserting non-exhaustion as an affirmative defense because of their behavior. As such, there will be some overlap in the analyses.”).

a. Availability of Remedy

As was discussed above, in New York, the DOCCS has implemented the three-step IGP in accordance with the requirements under the PLRA. 7 N.Y.C.R.R. § 701.5. Despite an inmate's entitlement in most instances to file and pursue a grievance in accordance with the IGP, there are circumstances in which the grievance procedure nonetheless is deemed unavailable to an inmate-plaintiff. *Hemphill*, 380 F.3d at 686. For example, "[e]xhaustion may be considered unavailable in situations where plaintiff is unaware of the grievance procedures or did not understand it, or where defendants' behavior prevents plaintiff from seeking administrative remedies." *Hargrove*, 2007 WL 389003, at *8 (internal citation omitted); see also *Abney v. McGinnis*, 380 F.3d 663 (2d Cir. 2004) (holding that, where a prisoner's favorable decision is not properly implemented, and the time to appeal the decision has expired, the prisoner's available administrative remedies had been exhausted).

Here, plaintiff does not argue that he was "unaware of the grievance procedures or did not understand it." *Hargrove*, 2007 WL 389003, at *8. See Plf.'s Dep. Tr. (Dkt. No. 55, Attach. 2) at 72 ("Q: So

you're familiar with the Inmate Grievance Program; right? A: Yes.”).

Rather, he alleges that the grievance procedure was unavailable to him because corrections officers intercepted and discarded the two grievances that he left in his meal slot shortly after arriving in PC. Am. Compl. (Dkt. No. 37) at 3-4; Plf.’s Dep. Tr. (Dkt. No. 55, Attach. 2) at 64-68. Plaintiff admitted at his deposition, however, that he is only speculating when he alleges that the officers who picked up his mail discarded those grievances. *Id.* at 70-71. Similarly, plaintiff admitted that he does not know who retrieved his grievances, which means he does not know whether any of the named-defendants were responsible for, or aware of, the alleged interception of his grievances. *Id.* at 68. Plaintiff also acknowledged that other mail that he sent from PC did reach the intended addressees. *Id.* at 69-70.

Plaintiff’s mere threadbare allegations that his grievances were intercepted and discarded, without evidence to support such allegation, including any evidence that identifies which defendant, in particular, is responsible for discarding the grievances, are insufficient to excuse his failure to comply with the IGP. *See Butler v. Martin*, No. 07-CV-0521, 2010 WL 980421, at *5 (N.D.N.Y. Mar. 15, 2010) (Scullin, J.) (finding

that the plaintiff was not excused from failing to avail himself of the administrative procedures where he alleged that his grievances were discarded but did not offer any evidence “that a particular officer discarded the[m]”); *Winston v. Woodward*, No. 05-CV-3385, 2008 WL 2263191, at *10 (S.D.N.Y. May 30, 2008) (“In light of Plaintiff’s failure to put forth any corroborating evidence, either direct or circumstantial, to support his claims that he suffered . . . mail tampering, . . . the Court finds, even taking the evidence in the light most favorable to Plaintiff, that he has not put forth sufficient evidence to sustain his burden[.]”); *Veloz v. New York*, 339 F. Supp. 2d 505, 514 (S.D.N.Y. 2004) (“Even assuming [the plaintiff] did submit grievances, he offers no evidence that any particular officer thwarted his attempts to file[.]”); *Nunez v. Goord*, 172 F. Supp. 2d 417, 429 (S.D.N.Y. 2001) (finding the plaintiff’s allegation that his failure to file grievances was due to ““the practice of certain officers”” to destroy them “stand[s] alone and unsupported”).

In any event, there is no dispute that, even assuming that any of the defendants did, in fact, intercept and discard plaintiff’s grievances, there were other avenues available to plaintiff for pursuing his grievances. For example, in his declaration, Hoagland notes that, at

least weekly, either the IGP supervisor or the sergeant assigned to the grievance office at Great Meadow makes rounds through the entire facility, including in D-block, where PC inmates are confined, to address grievance-related questions or issues. Hoagland Decl. (Dkt. No. 55, Attach. 15) at ¶ 5. During those rounds inmates may hand grievances directly to the person making the rounds.¹² *Id.* at ¶ 6. Accordingly, even assuming that plaintiff's grievances were intercepted, there was an available, alternative avenue for submitting those grievances directly to the IGP supervisor.

Finally, under the IGP, even if plaintiff's grievances were intercepted and not filed with the IGP clerk, "he had the ability – and the duty to – file an appeal regarding the non-processing of th[ose] grievance[s]." *Sidney*, 2012 WL 1380392, at *5 (collecting cases and finding that the plaintiff failed to exhaust available administrative remedies where he argued that a second grievance was "pilfered by theivery hands"); *Butler*, 2010 WL 980421, at *6 ("Plaintiff was obligated to appeal to the next administrative level once it became clear

¹² Again, because plaintiff has not disputed defendants' Local Rule 7.1 statement of material facts, which is, in part, supported by Hoagland's declaration, the court assumes the truth of the statements made in Hoagland's declaration.

to him that a response to his grievances was not forthcoming.” (citing, *inter alia*, 7 N.Y.C.R.R. § 701.6(g) (“[M]atters not decided within the time limits may be appealed to the next step.”)); *Veloz*, 339 F. Supp. 2d at 516 (“[P]laintiff’s allegation that these particular grievances were misplaced or destroyed by correctional officers ultimately does not relieve him of the requirement to appeal these claims to the next level once it became clear to him that a response to his initial filing was not forthcoming.”); *Reyes v. Punzal*, 206 F. Supp. 2d 431, 433 (W.D.N.Y. 2002) (“Even assuming that plaintiff never received a response to his grievance, he had further administrative avenues of relief open to him.”).

For all of these reasons, I conclude that the grievance process was available to plaintiff.

b. Estoppel

The second prong of the *Hemphill* analysis focuses upon “whether the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it, or whether the defendants’ own actions inhibiting the inmate’s exhaustion of remedies may estop one or more of the defendants from raising the plaintiff’s

failure to exhaust as a defense.” *Hemphill*, 380 F.3d at 686 (internal citations omitted). Exhaustion of remedies is an affirmative defense that must be raised by a defendant in response to an inmate suit. *Jones v. Block*, 549 U.S. 199, 216 (2007). Here, defendants have properly preserved the exhaustion defense by asserting it as an affirmative defense in their answers. Answer (Dkt. No. 39) at ¶ 15; Answer (Dkt. No. 45) at ¶ 15. Turning to estoppel, I find no basis in the record to support a finding that defendants should be precluded from relying upon the defense. “Estoppel will be found where an inmate reasonably understands that pursuing a grievance through the administrative process will be futile or impossible.” *Winston*, 2008 WL 2263191, at *9 (internal quotation marks omitted) (collecting cases). “[A] plaintiff’s failure to exhaust all administrative remedies may be excused on the grounds of estoppel where the plaintiff was misled, threatened, or otherwise deterred from fulfilling the requisite procedures.” *Id.* (citing, *inter alia*, *Hemphill*, 380 F.3d at 688-89).

As was discussed above, although plaintiff argues that the two grievances he left in his meal slot were discarded by corrections officers, for all of the same reasons that this argument fails when

analyzing whether administrative remedies were “available” to plaintiff, it similarly falls short in establishing that defendants should be estopped from asserting the exhaustion defense. *See Giano*, 380 F.3d at 677 n.6 (“We note that the case law on the PLRA’s exhaustion requirement does not always distinguish clearly between (a) cases in which defendants are estopped from asserting non-exhaustion as an affirmative defense, [and] (b) situations in which administrative remedies are not ‘available’ to the plaintiff[.]”); *see also Hargrove*, 2007 WL 389003, at *8 n. 14. The court would only add that, because plaintiff does not allege, or provide any evidence that, a named-defendant acted to interfere with his ability to exhaust in order to establish a basis to estop that defendant from invoking the exhaustion defense, he has failed to establish a dispute of material fact as to whether any of defendants are estopped from asserting the exhaustion defense. *See Atkins v. Menard*, No. 11-CV-9366, 2012 WL 4026840, at *3 (N.D.N.Y. Sept. 12, 2012) (Suddaby, J.) (“Generally, a defendant in an action may not be estopped from asserting the affirmative defense of failure to exhaust administrative remedies based on the actions (or inactions) of other individuals.”).

c. Special Circumstances

The third, catchall factor to be considered under the Second Circuit's exhaustion test focuses upon whether special circumstances exist to justify excusing a plaintiff's failure to exhaust available administrative remedies, notwithstanding the fact that the administrative remedies were available, and the defendants are not estopped from asserting the defense. *Hemphill*, 380 F.3d at 689; *Giano*, 380 F.3d at 676-77. Among the circumstances potentially qualifying as "special" under this prong of the test include where a plaintiff's reasonable interpretation of applicable regulations regarding the grievance process differs from that of prison officials, and leads the plaintiff to conclude that the dispute is not grievable. *Giano*, 380 F.3d at 676-77, *accord*, *Hargrove*, 2007 WL 389003, at *10.

Here, there is no allegation that special circumstances exist to excuse plaintiff's failure to exhaust available administrative remedies, nor does plaintiff offer any evidence of potentially applicable special circumstances. As a result, I find that plaintiff is not excused from his failure to exhaust administrative remedies before commencing this action, and I recommend that his amended complaint be dismissed on

this procedural basis alone.¹³

IV. SUMMARY AND RECOMMENDATION

It is undisputed that, prior to commencing this action, plaintiff failed to exhaust his administrative remedies by pursuing to completion any grievance related to the events giving rise to this action. In light of this failure, and finding no basis to conclude that plaintiff's compliance with the IGP should be excused, I recommend dismissal of plaintiff's amended complaint in its entirety on this basis alone, without addressing either the merits of his claims, or the qualified immunity argument advanced by defendants in support of their motion for summary judgment. Accordingly, it is hereby respectfully

RECOMMENDED that defendants' motion for summary judgment (Dkt. No. 55) be GRANTED, and that plaintiff's amended complaint be

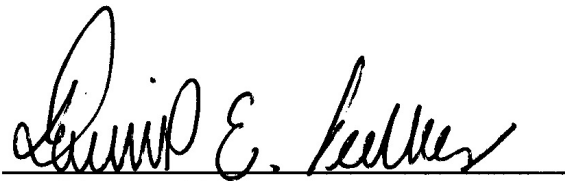
¹³ In recommending dismissal of plaintiff's amended complaint in its entirety, I include the defendant identified as "John Doe #1" who has neither been identified nor appeared in the action. Because that defendant is not specifically alleged to have been, nor is there record evidence to establish that he was, involved in the interception and discarding of plaintiff's grievances, I find he would not be estopped from asserting the exhaustion defense and thus, like the named-defendants, would be entitled to dismissal on the basis of plaintiff's failure to exhaust. Alternatively, I recommend dismissal of all claims against defendant Doe, *sua sponte*, based upon plaintiff's failure to properly identify and serve him, as required under both Federal Rules of Civil Procedure and this court's local rules, despite the fact that this case has been pending for more than two years, and based on plaintiff's failure, prior to the close of discovery, to ascertain the identity of that individual. Fed. R. Civ. P. 41(b),(m); see also *Butler*, 2010 WL 980421, at *6-7.

DISMISSED in its entirety.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993).

It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court's local rules.

Dated: February 12, 2013
Syracuse, New York

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Not Reported in F.Supp.2d, 2000 WL 1264122 (N.D.N.Y.)
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C Only the Westlaw citation is currently available.

United States District Court, N.D. New York.
Lisa ELGAMIL, Plaintiff,
v.
SYRACUSE UNIVERSITY, Defendant.
No. 99-CV-611 NPMGLS.

Aug. 22, 2000.

Joch & Kirby, Ithaca, New York, for Plaintiff, Joseph Joch, of counsel.

Bond, Schoeneck & King, LLP, Syracuse, New York, for Defendant, John Gaal, [Paul Limmiatis](#), of counsel.

MEMORANDUM-DECISION AND ORDER

[MCCURN](#), Senior J.

INTRODUCTION

*1 Plaintiff brings suit against defendant Syracuse University ("University") pursuant to [20 U.S.C. § 1681etseq.](#) ("Title IX") claiming hostile educational environment, and retaliation for complaints of same. Presently before the court is the University's motion for summary judgment. Plaintiff opposes the motion.

LOCAL RULES PRACTICE

The facts of this case, which the court recites below, are affected by plaintiff's failure to file a Statement of Material Facts which complies with the clear mandate of Local

Rule 7.1(a)(3) of the Northern District of New York. This Rule requires a motion for summary judgment to contain a Statement of Material Facts with specific citations to the record where those facts are established. A similar obligation is imposed upon the non-movant who

shall file a response to the [movant's] Statement of Material Facts. The non-movant's response shall mirror the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises.... *Any facts set forth in the [movant's] Statement of material Facts shall be deemed admitted unless specifically controverted by the opposing party.*

L.R. 7.1(a)(3) (emphasis in original).

In moving for summary judgment, the University filed an eleven page, twenty-nine paragraph Statement of Material Facts, replete with citations to the record in every paragraph. Plaintiff, in opposition, filed a two page, nine paragraph statement appended to her memorandum of law which failed to admit or deny the specific assertions set forth by defendant, and which failed to contain a single citation to the record. Plaintiff has thus failed to comply with Rule 7.1(a)(3).

As recently noted in another decision, "[t]he Local Rules are not suggestions, but impose procedural requirements upon parties litigating in this District." [Osier v. Broome County](#), 47 F.Supp.2d 311, 317 (N.D.N.Y.1999). As a consequence, courts in this district have not hesitated to enforce Rule 7.1(a)(3) and its predecessor, Rule 7.1(f) ^{FNI} by deeming the facts asserted in a movant's proper Statement of Material Facts as admitted, when, as here, the opposing party has failed to comply with the Rule. See, e.g., [Phipps v. New York State Dep't of Labor](#), 53 F.Supp.2d 551, 556-57 (N.D.N.Y.1999); [DeMar v. Car-Freshner Corp.](#), 49 F.Supp.2d 84, 86 (N.D.N.Y.1999); [Osier](#), 47 F. Supp. 2d at 317; [Nicholson v. Doe](#), 185 F.R.D. 134, 135 (N.D.N.Y.1999); [TSI Energy](#).

Not Reported in F.Supp.2d, 2000 WL 1264122 (N.D.N.Y.)
(Cite as: 2000 WL 1264122 (N.D.N.Y.))

Inc. v. Stewart and Stevenson Operations, Inc., 1998 WL 903629, at *1 n. 1 (N.D. N.Y.1998); *Costello v. Norton*, 1998 WL 743710, at *1 n. 2 (N.D.N.Y.1998); *Squair v. O'Brien & Gere Engineers, Inc.*, 1998 WL 566773, at *1 n. 2 (N.D.N.Y.1998). As in the cases just cited, this court deems as admitted all of the facts asserted in defendant's Statement of Material Facts. The court next recites these undisputed facts.

[FN1](#). Amended January 1, 1999.

BACKGROUND

*2 Plaintiff became a doctoral student in the University's Child and Family Studies ("CFS") department in the Spring of 1995. Successful completion of the doctoral program required a student to (1) complete 60 credit hours of course work; (2) pass written comprehensive examinations ("comp.exams") in the areas of research methods, child development, family theory and a specialty area; (3) after passing all four comp. exams, orally defend the written answers to those exams; (4) then select a dissertation topic and have the proposal for the topic approved; and (5) finally write and orally defend the dissertation. Plaintiff failed to progress beyond the first step.

Each student is assigned an advisor, though it is not uncommon for students to change advisors during the course of their studies, for a myriad of reasons. The advisor's role is to guide the student in regard to course selection and academic progress. A tenured member of the CFS department, Dr. Jaipaul Roopnarine, was assigned as plaintiff's advisor.

As a student's comp. exams near, he or she selects an examination committee, usually consisting of three faculty members, including the student's advisor. This committee writes the questions which comprise the student's comp. exams, and provides the student with guidance and assistance in preparing for the exams. Each member of the committee writes one exam; one member writes two. Two evaluators grade each exam; ordinarily the faculty member who wrote the question, and one other faculty member

selected by the coordinator of exams.

Roopnarine, in addition to his teaching and advising duties, was the coordinator of exams for the entire CFS department. In this capacity, he was generally responsible for selecting the evaluators who would grade each student's comp. exam, distributing the student's answer to the evaluators for grading, collecting the evaluations, and compiling the evaluation results.

The evaluators graded an exam in one of three ways: "pass," "marginal" or "fail." A student who received a pass from each of the two graders passed that exam. A student who received two fails from the graders failed the exam. A pass and a marginal grade allowed the student to pass. A marginal and a fail grade resulted in a failure. Two marginal evaluations may result in a committee having to decide whether the student would be given a passing grade. In cases where a student was given both a pass and a fail, a third evaluator served as the tie breaker.

These evaluators read and graded the exam questions independently of each other, and no indication of the student's identity was provided on the answer. [FN2](#) The coordinator, Roopnarine, had no discretion in compiling these grades-he simply applied the pass or fail formula described above in announcing whether a student passed or failed the comp. exams. Only after a student passed all four written exam questions would he or she be permitted to move to the oral defense of those answers.

[FN2](#). Of course, as mentioned, because one of the evaluators may have written the question, and the question may have been specific to just that one student, one of the two or three evaluators may have known the student's identity regardless of the anonymity of the examination answer.

*3 Plaintiff completed her required course work and took the comp. exams in October of 1996. Plaintiff passed two of the exams, family theory and specialty, but failed two, child development and research methods. On each of the exams she failed, she had one marginal grade, and one failing grade. Roopnarine, as a member of her committee,

Not Reported in F.Supp.2d, 2000 WL 1264122 (N.D.N.Y.)
(Cite as: 2000 WL 1264122 (N.D.N.Y.))

authored and graded two of her exams. She passed one of them, specialty, and failed the other, research methods. Roopnarine, incidently, gave her a pass on specialty, and a marginal on research methods. Thus it was another professor who gave her a failing grade on research methods, resulting in her failure of the exam. As to the other failed exam, child development, it is undisputed that Roopnarine neither wrote the question, nor graded the answer.

Pursuant to the University's procedures, she retok the two exams she failed in January of 1997. Despite being given the same questions, she only passed one, child development. She again failed research methods by getting marginal and fail grades from her evaluators. This time, Roopnarine was not one of the evaluators for either of her exam questions.

After this second unsuccessful attempt at passing research methods, plaintiff complained to the chair of the CFS department, Dr. Norma Burgess. She did not think that she had been properly prepared for her exam, and complained that she could no longer work with Roopnarine because he yelled at her, was rude to her, and was otherwise not responsive or helpful. She wanted a new advisor. Plaintiff gave no indication, however, that she was being sexually harassed by Roopnarine.

Though plaintiff never offered any additional explanation for her demands of a new advisor, Burgess eventually agreed to change her advisor, due to plaintiff's insistence. In March of 1997, Burgess and Roopnarine spoke, and Roopnarine understood that he would no longer be advising plaintiff. After that time period, plaintiff and Roopnarine had no further contact. By June of that year, she had been assigned a new advisor, Dr. Mellisa Clawson.

Plaintiff then met with Clawson to prepare to take her research methods exam for the third time. Despite Clawson's repeated efforts to work with plaintiff, she sought only minimal assistance; this was disturbing to Clawson, given plaintiff's past failures of the research methods exam. Eventually, Clawson was assigned to write plaintiff's third research methods exam.

The first time plaintiff made any mention of sexual harassment was in August of 1997, soon before plaintiff made her third attempt at passing research methods. She complained to Susan Crockett, Dean of the University's College of Human Development, the parent organization of the CFS department. Even then, however, plaintiff merely repeated the claims that Roopnarine yelled at her, was rude to her, and was not responsive or helpful. By this time Roopnarine had no contact with plaintiff in any event. The purpose of plaintiff's complaint was to make sure that Roopnarine would not be involved in her upcoming examination as exam coordinator. Due to plaintiff's complaints, Roopnarine was removed from all involvement with plaintiff's third research methods examination. As chair of the department, Burgess took over the responsibility for serving as plaintiff's exam coordinator. Thus, Burgess, not Roopnarine, was responsible for receiving plaintiff's answer, selecting the evaluators, and compiling the grades of these evaluators; [FN3](#) as mentioned, Clawson, not Roopnarine, authored the exam question.

[FN3](#). Plaintiff appears to allege in her deposition and memorandum of law that Roopnarine remained the exam coordinator for her third and final exam. *See* Pl.'s Dep. at 278; Pl.'s Mem. of Law at 9. The overwhelming and undisputed evidence in the record establishes that Roopnarine was not, in fact, the coordinator of this exam. Indeed, as discussed above, the University submitted a Statement of Material Facts which specifically asserted in paragraph 18 that Roopnarine was removed from all involvement in plaintiff's exam, including the role of exam coordinator. *See* Def.'s Statement of Material Facts at ¶ 18 (and citations to the record therein). Aside from the fact that this assertion is deemed admitted for plaintiff's failure to controvert it, plaintiff cannot maintain, without any evidence, that Roopnarine was indeed her exam coordinator. Without more than broad, conclusory allegations of same, no genuine issue of material fact exists on this question.

*4 Plaintiff took the third research methods examination

Not Reported in F.Supp.2d, 2000 WL 1264122 (N.D.N.Y.)
(Cite as: 2000 WL 1264122 (N.D.N.Y.))

in September of 1997. Clawson and another professor, Dr. Kawamoto, were her evaluators. Clawson gave her a failing grade; Kawamoto indicated that there were "some key areas of concern," but not enough for him to deny her passage. As a result of receiving one passing and one failing grade, plaintiff's research methods exam was submitted to a third evaluator to act as a tie breaker. Dr. Dean Busby, whose expertise was research, was chosen for this task. Busby gave plaintiff a failing grade, and began his written evaluation by stating that

[t]his is one of the most poorly organized and written exams I have ever read. I cannot in good conscience vote any other way than a fail. I tried to get it to a marginal but could not find even one section that I would pass.

Busby Aff. Ex. B.

The undisputed evidence shows that Clawson, Kawamoto and Busby each evaluated plaintiff's exam answer independently, without input from either Roopnarine or anyone else. Kawamoto and Busby did not know whose exam they were evaluating. ^{FN4} Importantly, it is also undisputed that none of the three evaluators knew of plaintiff's claims of sexual harassment.

^{FN4}. Clawson knew it was plaintiff's examination because she was plaintiff's advisor, and wrote the examination question.

After receiving the one passing and two failing evaluations, Burgess notified plaintiff in December of 1997 that she had, yet again, failed the research methods exam, and offered her two options. Although the University's policies permitted a student to only take a comp. exam three times (the original exam, plus two retakes), the CFS department would allow plaintiff to retake the exam for a fourth time, provided that she took a remedial research methods class to strengthen her abilities. Alternatively, Burgess indicated that the CFS department would be willing to recommend plaintiff for a master's degree based on her graduate work. Plaintiff rejected both offers.

The second time plaintiff used the term sexual harassment in connection with Roopnarine was six months after she was notified that she had failed for the third time, in May of 1998. Through an attorney, she filed a sexual harassment complaint against Roopnarine with the University. This written complaint repeated her allegations that Roopnarine had yelled at her, been rude to her, and otherwise had not been responsive to her needs. She also, for the first time, complained of two other acts:

1. that Roopnarine had talked to her about his sex life, including once telling her that women are attracted to him, and when he attends conferences, they want to have sex with him over lunch; and

2. that Roopnarine told her that he had a dream in which he, plaintiff and plaintiff's husband had all been present.

Prior to the commencement of this action, this was the only specific information regarding sexual harassment brought to the attention of University officials.

The University concluded that the alleged conduct, if true, was inappropriate and unprofessional, but it did not constitute sexual harassment. Plaintiff then brought this suit. In her complaint, she essentially alleges two things; first, that Roopnarine's conduct subjected her to a sexually hostile educational environment; and second, that as a result of complaining about Roopnarine's conduct, the University retaliated against her by preventing her from finishing her doctorate, mainly, by her failing her on the third research methods exam.

***5** The University now moves for summary judgment. Primarily, it argues that the alleged conduct, if true, was not sufficiently severe and pervasive to state a claim. Alternatively, it argues that it cannot be held liable for the conduct in any event, because it had no actual knowledge of plaintiff's alleged harassment, and was not deliberately indifferent to same. Finally, it argues that plaintiff is unable to establish a retaliation claim. These contentions are addressed below.

Not Reported in F.Supp.2d, 2000 WL 1264122 (N.D.N.Y.)
(Cite as: 2000 WL 1264122 (N.D.N.Y.))

DISCUSSION

The principles that govern summary judgment are well established. Summary judgment is properly granted only when “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). When considering a motion for summary judgment, the court must draw all factual inferences and resolve all ambiguities in favor of the nonmoving party. See Torres v. Pisano, 116 F.3d 625, 630 (2d Cir.1997). As the Circuit has recently emphasized in the discrimination context, “summary judgment may not be granted simply because the court believes that the plaintiff will be unable to meet his or her burden of persuasion at trial.” Danzer v. Norden Sys., Inc., 151 F.3d 50, 54 (2d Cir.1998). Rather, there must be either an absence of evidence that supports plaintiff's position, see Norton v. Sam's Club, 145 F.3d 114, 117-20 (2d Cir.), *cert. denied*, 525 U.S. 1001 (1998), “or the evidence must be so overwhelmingly tilted in one direction that any contrary finding would constitute clear error.” Danzer, 151 F.3d at 54. Yet, as the Circuit has also admonished, “purely conclusory allegations of discrimination, absent any concrete particulars,” are insufficient to defeat a motion for summary judgment. Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.1985). With these principles in mind, the court turns to defendant's motion.

I. Hostile Environment

Title IX provides, with certain exceptions not relevant here, that

[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

Recently, the Supreme Court reiterated that Title IX is enforceable through an implied private right of action, and that monetary damages are available in such an action.

See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, , 118 S.Ct. 1989, 1994 (1998) (citing Cannon v. University of Chicago, 441 U.S. 677 (1979) and Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992)).

A. Severe or Pervasive

Provided that a plaintiff student can meet the requirements to hold the school itself liable for the sexual harassment,^{FN5} claims of hostile educational environment are generally examined using the case law developed for hostile work environment under Title VII. See Davis, 119 S.Ct. at 1675 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986), a Title VII case). Accord Kracunas v. Iona College, 119 F.3d 80, 87 (2d Cir.1997); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir.1995), both abrogated on other grounds by Gebser, 118 S.Ct. at 1999.

^{FN5} In Gebser, 118 S.Ct. at 1999, and Davis v. Monroe County Bd. of Educ., 526 U.S. 629, , 119 S.Ct. 1661, 1671 (1999), the Supreme Court explicitly departed from the *respondeat superior* principles which ordinarily govern Title VII actions for purposes of Title IX; in a Title IX case it is now clear that a school will not be liable for the conduct of its teachers unless it knew of the conduct and was deliberately indifferent to the discrimination. Defendant properly argues that even if plaintiff was subjected to a hostile environment, she cannot show the University's knowledge and deliberate indifference. This argument will be discussed below.

It bears noting that courts examining sexual harassment claims sometimes decide first whether the alleged conduct rises to a level of actionable harassment, before deciding whether this harassment can be attributed to the defendant employer or school, as this court does here. See, e.g., Distasio v. Perkin Elmer Corp., 157 F.3d 55 (2d Cir.1998). Sometimes, however, courts first examine whether the defendant can be held liable for the conduct,

Not Reported in F.Supp.2d, 2000 WL 1264122 (N.D.N.Y.)
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and only then consider whether this conduct is actionable. *See, e.g., Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 767 n. 8 (2d Cir.1998). As noted in *Quinn*, the Circuit has not instructed that the sequence occur in either particular order. *See id.*

*6 In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993), the Supreme Court stated that in order to succeed, a hostile environment claim must allege conduct which is so “severe or pervasive” as to create an “‘objectively’ hostile or abusive work environment,” which the victim also “subjectively perceive[s] ... to be abusive.” *Richardson v. New York State Dep’t of Corr. Servs.*, 180 F.3d 426, 436 (alteration in original) (quoting *Harris*, 510 U.S. at 21-22). From this court’s review of the record, there is no dispute that plaintiff viewed her environment to be hostile and abusive; hence, the question before the court is whether the environment was “objectively” hostile. *See id.* Plaintiff’s allegations must be evaluated to determine whether a reasonable person who is the target of discrimination would find the educational environment “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim[’s] educational experience, that [this person is] effectively denied equal access to an institution’s resources and opportunities.” *Davis*, 119 S.Ct. at 1675.

Conduct that is “merely offensive” but “not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive” is beyond the purview of the law. *Harris*, 510 U.S. at 21. Thus, it is now clear that neither “the sporadic use of abusive language, gender-related jokes, and occasional testing,” nor “intersexual flirtation,” accompanied by conduct “merely tinged with offensive connotations” will create an actionable environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). Moreover, a plaintiff alleging sexual harassment must show the hostility was based on membership in a protected class. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998). Thus, to succeed on a claim of sexual harassment, a plaintiff “must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimina[tion] ... because of ... sex.” *Id.* at 81 (alteration

and ellipses in original).

The Supreme Court has established a non-exclusive list of factors relevant to determining whether a given workplace is permeated with discrimination so severe or pervasive as to support a Title VII claim. *See Harris*, 510 U.S. at 23. These include the frequency of the discriminatory conduct, its severity, whether the conduct was physically threatening or humiliating, whether the conduct unreasonably interfered with plaintiff’s work, and what psychological harm, if any, resulted from the conduct. *See id.*; *Richardson*, 180 F.3d at 437.

Although conduct can meet this standard by being either “frequent” or “severe,” *Osier*, 47 F.Supp.2d at 323, “isolated remarks or occasional episodes of harassment will not merit relief []; in order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive.” ‘ *Quinn*, 159 F.3d at 767 (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 n. 5 (2d Cir.1995)). Single or episodic events will only meet the standard if they are sufficiently threatening or repulsive, such as a sexual assault, in that these extreme single incidents “may alter the plaintiff’s conditions of employment without repetition.” *Id.* *Accord Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir.1992) (“[t]he incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief.”).

*7 The University quite properly argues that the conduct plaintiff alleges is not severe and pervasive. As discussed above, she claims that she was subjected to behavior by Roopnarine that consisted primarily of his yelling at her, being rude to her, and not responding to her requests as she felt he should. This behavior is insufficient to state a hostile environment claim, despite the fact that it may have been unpleasant. *See, e.g., Gutierrez v. Henoch*, 998 F.Supp. 329, 335 (S.D.N.Y.1998) (disputes relating to job-related disagreements or personality conflicts, without more, do not create sexual harassment liability); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F.Supp. 294, 303 (S.D.N.Y.1987) (“there is a crucial difference between personality conflict ... which is unpleasant but legal ... [and sexual harassment] ... which is despicable and illegal.”). Moreover, the court notes that plaintiff has

Not Reported in F.Supp.2d, 2000 WL 1264122 (N.D.N.Y.)
(Cite as: 2000 WL 1264122 (N.D.N.Y.))

failed to show that this alleged behavior towards her was sexually related-an especially important failing considering plaintiff's own testimony that Roopnarine treated some males in much of the same manner. *See, e.g.*, Pl.'s Dep. at 298 ("He said that Dr. Roopnarine screamed at him in a meeting"). As conduct that is "equally harsh" to both sexes does not create a hostile environment, *Brennan v. Metropolitan Opera Ass'n, Inc.*, 192 F.3d 310, 318 (2d Cir.1999), this conduct, while demeaning and inappropriate, is not sufficiently gender-based to support liability. *See Osier*, 47 F.Supp.2d at 324.

The more detailed allegations brought forth for the first time in May of 1998 are equally unavailing. These allegations are merely of two specific, isolated comments. As described above, Roopnarine told plaintiff of his sexual interaction(s) with other women, and made a single, non-sexual comment about a dream in which plaintiff, plaintiff's husband, and Roopnarine were all present. Accepting as true these allegations, the court concludes that plaintiff has not come forward with evidence sufficient to support a finding that she was subject to abuse of sufficient severity or pervasiveness that she was "effectively denied equal access to an institution's resources and opportunities." *Davis*, 119 S.Ct. at 1675.

Quinn, a recent Second Circuit hostile work environment case, illustrates the court's conclusion well. There, plaintiff complained of conduct directed towards her including sexual touching and comments. She was told by her supervisor that she had been voted the "sleekest ass" in the office and the supervisor deliberately touched her breasts with some papers he was holding. 159 F.3d at 768. In the Circuit's view, these acts were neither severe nor pervasive enough to state a claim for hostile environment. *See id.* In the case at bar, plaintiff's allegations are no more severe than the conduct alleged in *Quinn*, nor, for that matter, did they occur more often. Thus, without more, plaintiff's claims fail as well.

*8 Yet, plaintiff is unable to specify any other acts which might constitute sexual harassment. When pressured to do so, plaintiff maintained only that she "knew" what Roopnarine wanted "every time [she] spoke to him" and that she could not "explain it other than that's the feeling [she] had." Pl.'s Dep. at 283-85, 287, 292. As defendant

properly points out, these very types of suspicions and allegations of repeated, but unarticulated conduct have been shown to be insufficient to defeat summary judgment. *See Meiri*, 759 F.2d at 998 (plaintiff's allegations that employer "'conspired to get of [her];" that he 'misconceived [her] work habits because of his subjective prejudice against [her] Jewishness;' and that she 'heard disparaging remarks about Jews, but, of course, don't ask me to pinpoint people, times or places.... It's all around us,'" are conclusory and insufficient to satisfy the demands of Rule 56) (alterations and ellipses in original); *Daves v. Pace Univ.*, 2000 WL 307382, at *5 (S.D.N.Y.2000) (plaintiff's attempts to create an appearance of pervasiveness by asserting "[t]he conduct to which I was subjected ... occurred regularly and over many months," without more "is conclusory, and is not otherwise supported in the record [and] therefore afforded no weight"); *Quiros v. Ciba-Geigy Corp.*, 7 F.Supp.2d 380, 385 (S.D.N.Y.1998) (plaintiff's allegations of hostile work environment without more than conclusory statements of alleged discrimination insufficient to defeat summary judgment); *Eng v. Beth Israel Med. Ctr.*, 1995 U.S. Dist. Lexis 11155, at *6 n. 1 (S.D.N.Y.1995) (plaintiff's "gut feeling" that he was victim of discrimination was no more than conclusory, and unable to defeat summary judgment). As plaintiff comes forward with no proper showing of either severe or pervasive conduct, her hostile environment claim necessarily fails.

B. Actual Knowledge / Deliberate Indifference

Even if plaintiff's allegations were sufficiently severe or pervasive, her hostile environment claim would still fail. As previously discussed, *see supra* note 5, the Supreme Court recently departed from the framework used to hold defendants liable for actionable conduct under Title VII. *See Davis*, 119 S.Ct. at 1671; *Gebser*, 118 S.Ct. at 1999. Pursuant to these new decisions, it is now clear that in order to hold an educational institution liable for a hostile educational environment under Title IX, it must be shown that "an official who at minimum has authority to address the alleged discrimination and to institute corrective measures on the [plaintiff's] behalf has actual knowledge of [the] discrimination [.]” *Gebser*, 118 S.Ct. at 1999 (emphasis supplied). What's more, the bar is even higher: after learning of the harassment, in order for the school to be liable, its response must then "amount to deliberate

Not Reported in F.Supp.2d, 2000 WL 1264122 (N.D.N.Y.)
(Cite as: 2000 WL 1264122 (N.D.N.Y.))

indifference to discrimination[.]” or, “in other words, [] *an official decision by the [school] not to remedy the violation.*” *Id.* (Emphasis supplied). *Accord* [Davis](#), 119 S.Ct. at 1671 (“we concluded that the [school] could be liable for damages only where the [school] itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge.”). This requires plaintiff to show that the school’s “own deliberate indifference effectively ‘cause[d]’ the discrimination.” *Id.* (alteration in original) (quoting [Gebser](#), 118 S.Ct. at 1999). The circuits that have taken the question up have interpreted this to mean that there must be evidence that actionable harassment continued to occur *after* the appropriate school official gained actual knowledge of the harassment. *See* [Reese v. Jefferson Sch. Dist.](#), 208 F.3d 736, 740 (9th Cir.2000); [Soper v. Hoben](#), 195 F.3d 845, 855 (6th Cir.1999); [Murreel v. School Dist. No. 1, Denver Colo.](#), 186 F.3d 1238, 1246 (10th Cir.1999); [Wills v. Brown Univ.](#), 184 F.3d 20, 26-27 (1st Cir.1999). There is no serious contention that plaintiff can satisfy this requirement.

*9 By the time plaintiff complained to Dean Crockett of sexual harassment in August of 1997, it is uncontested that her alleged harasser had no contact with her. Nor, for that matter, did he ultimately have any involvement in the third retake of her exam. She had a new advisor, exam committee and exam coordinator. Quite simply, by that point, Roopnarine had no involvement with her educational experience at all.^{FN6} This undisputed fact is fatal to plaintiff’s claim. As discussed above, the Supreme Court now requires some harm to have befallen plaintiff *after* the school learned of the harassment. As there have been no credible allegations of subsequent harassment, no liability can be attributed to the University.^{FN7} *See* [Reese](#), 208 F.3d at 740 (“There is no evidence that any harassment occurred after the school district learned of the plaintiffs’ allegations. Thus, under *Davis*, the school district cannot be deemed to have ‘subjected’ the plaintiffs to the harassment.”).

^{FN6}. Of course, plaintiff contends that the University had notice of the harassment prior to this time, through her complaints to Burgess that she no longer could work with Roopnarine, because he yelled at her, was rude to her, and

refused to assist her with various requests. But it is undisputed that she never mentioned sexual harassment, and provided no details that might suggest sexual harassment. Indeed, as pointed out by defendant, plaintiff *herself* admits that she did not consider the conduct sexual harassment until another person later told her that it might be, in June of 1997. *See* Pl.’s Dep. at 258-59, 340. As a result, plaintiff can not seriously contend that the University was on notice of the alleged harassment before August of 1997.

^{FN7}. As mentioned previously, *see* *supra* note 3, plaintiff maintains without any evidentiary support that Roopnarine played a role in her third exam. This allegation is purely conclusory, especially in light of the record evidence the University puts forward which demonstrates that he was not, in fact, involved in the examination.

As plaintiff’s allegations of harassment are not severe or pervasive enough to state a claim, and in any event, this conduct can not be attributed to the University, her hostile environment claim is dismissed.

II. Retaliation

Plaintiff’s retaliation claim must be dismissed as well. She cannot establish an actionable retaliation claim because there is no evidence that she was given failing grades due to complaints about Roopnarine. *See* [Murray](#), 57 F.3d at 251 (retaliation claim requires evidence of causation between the adverse action, and plaintiff’s complaints of discrimination). The retaliation claim appears to be based exclusively on plaintiff’s speculative and conclusory allegation that Roopnarine was involved in or influenced the grading of her third research methods exam.^{FN8} In any event, the adverse action which plaintiff claims to be retaliation must be limited to her failing grade on the third research methods exam, since plaintiff made no complaints of sexual harassment until August of 1997, long after plaintiff failed her second examination. *See* [Murray](#), 57 F.3d at 251 (retaliation claim requires proof that defendant had knowledge of plaintiff’s protected activity at the time of the adverse reaction); [Weaver v.](#)

Not Reported in F.Supp.2d, 2000 WL 1264122 (N.D.N.Y.)
(Cite as: 2000 WL 1264122 (N.D.N.Y.))

Ohio State Univ., 71 F.Supp.2d 789, 793-94 (S.D. Ohio)
("[c]omplaints concerning unfair treatment in general
which do not specifically address discrimination are
insufficient to constitute protected activity"), *aff'd*, 194
F.3d 1315 (6th Cir.1999).

[plaintiffs] case was inconsistent with these
standards.").

CONCLUSION

FN8. As properly noted by defendant, *see* Def.
Mem. of Law at 28 n. 14, plaintiff's complaint
alleges that a number of individuals retaliated
against her, but in her deposition she essentially
conceded that she has no basis for making a
claim against anyone other than Roopnarine and
those who graded her third exam. *See* Pl.'s Dep.
at 347-53.

***10** For the aforementioned reasons, Syracuse University's
motion for summary judgment is GRANTED; plaintiff's
claims of hostile environment and retaliation are
DISMISSED.

IT IS SO ORDERED.

The undisputed evidence establishes that Roopnarine had
no role in the selection of who would grade plaintiff's
exam. Nor, for that matter, did he grade the exam; this was
done by three other professors. Each of these professors
has averred that they graded the exam without any input or
influence from Roopnarine. More importantly, it is
undisputed that none of the three had any knowledge that
a sexual harassment complaint had been asserted by
plaintiff against Roopnarine, not surprising since two of
the three did not even know whose exam they were
grading. Plaintiff's inability to show that her failure was
causally related in any way to her complaint of harassment
is fatal to her retaliation claim.^{FN9}

N.D.N.Y., 2000.
Elgamil v. Syracuse University
Not Reported in F.Supp.2d, 2000 WL 1264122
(N.D.N.Y.)

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FN9. Plaintiff's claim also fails to the extent that
the school's refusal to let her take the research
methods exam for a fourth time was the retaliatory act she relies upon. It is undisputed
that the University's policies for CFS department
students only allow a comp. exam to be given
three times. *See* Gaal Aff. Ex. 53. Plaintiff
cannot claim that the University's refusal to
depart from its own policies was retaliation
without some concrete showing that its refusal to
do so was out of the ordinary, i.e., that it had
allowed other students to take the exam a fourth
time without a remedial course, when these other
students had not engaged in some protected
activity. *See Murray*, 57 F.3d at 251 (there is "no
allegation either that NYU selectively enforced
its academic standards, or that the decision in

Not Reported in F.Supp., 1997 WL 160124 (N.D.N.Y.)
(Cite as: 1997 WL 160124 (N.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court, N.D. New York.

Larry TINSLEY, Plaintiff,

v.

Gary GREENE, Deputy Superintendent of Great Meadow Correctional Facility; Jim Lanfear, Maintenance Supervisor, Great Meadow Correctional Facility; Gary Yule, Corrections Officer, Great Meadow Correctional Facility; and David Roberts, Senior Counselor, Great Meadow Correctional Facility, Defendants.

No. 95-CV-1765 (RSP/DRH).

March 31, 1997.

Larry Tinsley, Pro Se.

Dennis C. Vacco, New York State Attorney General, [Darren O'Connor](#), Assistant Attorney General, of counsel, for Defendants.

ORDER

POOLER, District Judge.

*1 The above matter comes to me following a report-recommendation and order by Magistrate Judge David R. Homer, duly filed on the 13th day of September, 1996. Dkt. No. 24. Following ten days from the service thereof, the clerk has sent me the entire file, including any objections thereto. Plaintiff Larry Tinsley filed objections. Dkt. Nos. 25, 26.

In his report-recommendation, Magistrate Judge Homer advises that Tinsley failed to establish or raise a genuine issue of material fact regarding the nature of his

confinement. Report-recommendation, Dkt. No. 24, at 9-10. There is no dispute that prison officials confined Tinsley to keeplock and loss of some privileges for 60 days after they conducted a search of his cell, found a marijuana cigarette in the cell, and found Tinsley guilty of possessing a controlled substance after a Tier III disciplinary hearing. Tinsley's conviction and sentence were affirmed on administrative appeal. In his lawsuit under [42 U.S.C. § 1983](#), Tinsley raises several charges to the manner in which defendants conducted the search and disciplinary hearing. However, Tinsley failed to specify in any manner that his punishment posed an "atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." [Sandin v. Connor, 515 U.S. 472, ---, 115 S.Ct. 2293, 1300, 132 L.Ed.2d 418, --- \(1995\)](#). Without this showing, plaintiff failed to allege a deprivation of his Fourteenth Amendment due process liberty interest, and his civil rights claim must fail. *Id.*

In his objections to the report-recommendation, Tinsley makes general attacks regarding the alleged bias of Magistrate Judge David Homer and argues that the magistrate judge has misconstrued his claims. Plaintiff also asks me to reconsider defendants' summary judgment motion and review plaintiffs memorandum opposing the motion. However, Tinsley has not raised any allegation regarding the nature of his punishment, which is the threshold issue under *Sandin*. I have reviewed the entire file in this matter, including plaintiff's many submissions, and I find that he failed to raised any issue of fact to support an alleged deprivation of his due process liberty interests. Magistrate Judge Homer's thorough report-recommendation is neither biased nor a mischaracterization of plaintiffs claims.

For the foregoing reasons, it is therefore

ORDERED that the report-recommendation of September 13, 1996, is approved, and

ORDERED that plaintiffs' motion for default summary judgment is denied as moot, and

Not Reported in F.Supp., 1997 WL 160124 (N.D.N.Y.)
(Cite as: 1997 WL 160124 (N.D.N.Y.))

ORDERED that defendants' motion for summary judgment is granted, and it is further

ORDERED that the clerk serve a copy of this order upon the parties by regular mail.

IT IS SO ORDERED.

HOMER, United States Magistrate Judge.

REPORT-RECOMMENDATION AND ORDER ^{FN1}

^{FN1} This matter was referred to the undersigned for report and recommendation by United States District Judge Rosemary S. Pooler pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).

The plaintiff a New York State Department of Correctional Services (DOCS) inmate currently confined at the Great Meadow Correctional Facility (Great Meadow), brought this pro se action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendants violated his rights under the Fourth and Fourteenth Amendments in connection with a search of his cell and ensuing disciplinary hearing. Plaintiff seeks compensatory and punitive damages as well as injunctive relief.

*2 Presently pending are defendants' motion for summary judgment (Docket No. 17), plaintiff's letter-memorandum requesting summary judgment by default (Docket No. 11), and plaintiff's motions for a pre-trial conference (Docket No. 20) and for appointment of counsel (Docket No. 21). For the reasons stated below, it is recommended that the defendants' motion be granted and that plaintiff's motions be denied.

I. BACKGROUND

On October 30, 1995, while plaintiff was incarcerated at Great Meadow, defendant Greene received information from a confidential source that plaintiff was concealing escape materials. Defendant Greene ordered the search of plaintiff's prison cell. The search was executed by

Corrections Officer Rando and defendant Yule and was supervised by Sergeant Smith. No escape materials were found. However, the officers found a rolled cigarette in plaintiff's cell. The cigarette tested positive for marijuana. Plaintiff was placed in keeplock ^{FN2} and was given a contraband receipt for the cigarette that was removed from his cell.

^{FN2}. "Keeplock is a form of disciplinary confinement segregating an inmate from other inmates and depriving him of participation in normal prison activities." Green v. Bauvi, 46 F.3d 189, 192 (2d Cir.1995); N.Y. Comp.Codes R. & Regs. tit. 7, § 301.6 (1995).

Plaintiff was served with a misbehavior report which charged him with possession of a controlled substance. A Tier III disciplinary hearing ^{FN3} was commenced on November 3, 1995 before defendant Lanfear as the hearing officer. During the hearing, plaintiff claimed that defendant Greene failed to corroborate the reliability of the confidential informant, the search was improperly supervised, he did not receive the requisite contraband slip, defendants did not remove any contraband item from plaintiff's cell, and defendants failed to sign the misbehavior report. Plaintiff also objected when witnesses were not called in the order he had requested.

^{FN3}. DOCS regulations provide for three tiers of disciplinary hearings depending on the seriousness of the misconduct charged. A Tier III hearing, or superintendent's hearing, is required whenever disciplinary penalties exceeding thirty days may be imposed. N.Y. Comp.Codes R. & Regs. tit. 7, §§ 254.7(iii), 270.3(a) (1995); Walker v. Bates, 23 F.3d 652, 654 (2d Cir.1994), *cert. denied*, 515 U.S. 1157, 115 S.Ct. 2608, 132 L.Ed.2d 852 (1995).

At the conclusion of the hearing on November 7, 1995, defendant Lanfear found plaintiff guilty based upon the

statement in the misbehavior report submitted by C.O. Rando endorsed by C.O. Yule. Testimony during hearing by C.O. Yule verified the report and stated the substance

Not Reported in F.Supp., 1997 WL 160124 (N.D.N.Y.)
(Cite as: 1997 WL 160124 (N.D.N.Y.))

was found in Tinsley's cell. Testimony during hearing by Sgt. Sawyer stated he received the item found by C.O. Rando and tested same which proved positive for controlled substance. Testimony was considered during hearing by Tinsley.

Defs.' Statement Pursuant to Rule 7.1(f) (Docket No. 17), Ex. A, p. 16. Plaintiff was sentenced to confinement in keeplock for sixty days and loss of packages, commissary and telephone privileges for sixty days. Shortly after this action was commenced, plaintiff's conviction and sentence were affirmed on administrative appeal.

II. SUMMARY JUDGMENT

A. Legal Standard

Under [Fed.R.Civ.P. 56\(c\)](#), if there is "no genuine issue as to any material fact ... the moving party is entitled to judgment as a matter of law ... where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." See [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 585-86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The burden to demonstrate that no genuine issue of material fact exists falls solely on the moving party. [Federal Deposit Ins. Corp. v. Giammettei](#), 34 F.3d 51, 54 (2d Cir.1994); see also [Heyman v. Commerce and Industry Ins. Co.](#), 524 F.2d 1317, 1320 (2d Cir.1975). Once the moving party has provided sufficient evidence to support a motion for summary judgment, the opposing party must "set forth specific facts showing that there is a genuine issue for trial" and cannot rest on "mere allegations or denials" of the facts asserted by the movant. [Fed.R.Civ.P. 56\(e\)](#); accord [Rexnord Holdings, Inc. v. Bidermann](#), 21 F.3d 522, 525-26 (2d Cir.1994).

*3 The trial court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmovant. [American Cas. Co. of Reading Pa. v. Nordic Leasing, Inc.](#), 42 F.3d 725, 728 (2d Cir.1994); see also [Eastway Construction Corp. v. City of New York](#), 762 F.2d 243, 249 (2d Cir.1985). The nonmovant may defeat summary judgment by producing specific facts showing that there is a genuine issue of material fact for trial. [Celotex Corp. v.](#)

[Catrett](#), 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. Discussion

The defendants move for summary judgment on the grounds that (1) plaintiff's due process allegations fail to state a claim, (2) plaintiff's hearing was conducted in accordance with constitutional requirements, (3) the search of plaintiff's cell did not violate any of plaintiff's constitutional rights, and (4) defendants are entitled to qualified immunity.

1. Due Process Liberty Interest

Plaintiff contends that his due process rights were violated because the November 3-7, 1995 disciplinary hearing was improperly executed, and as a result, he was wrongly confined to sixty days keeplock.^{FN4} In their motion for summary judgment, defendants contend that under [Sandin v. Conner](#), 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), plaintiff lacked any liberty interest protected by the Due Process Clause.

^{FN4} New York regulations permit placement in keeplock for both disciplinary and administrative reasons. These include, among others, punishment for misconduct and protective custody. [N.Y. Comp.Codes R. & Regs. tit. 7, § 301.1-.7 \(1995\)](#).

A due process claim as alleged by plaintiff will lie under [section 1983](#) only where the alleged violation infringed a cognizable liberty interest. [Allison v. Kyle](#), 66 F.3d 71, 74 (5th Cir.1995). Under [Sandin](#), a court must first determine whether the deprivation of which an inmate complains merits the protections afforded by the Due Process Clause. A protected liberty interest

will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes *atypical and*

Not Reported in F.Supp., 1997 WL 160124 (N.D.N.Y.)
(Cite as: 1997 WL 160124 (N.D.N.Y.))

significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. at 2300 (emphasis added). The Court held that confinement of the plaintiff for thirty days in a segregated housing unit infringed no liberty interest protected by the Due Process Clause. *Id.* at 2302.

At first blush *Sandin* appeared to mark a radical change in the litigation of inmates' due process claims. It appeared to suggest that the number of sufficiently stated claims would be drastically reduced. See [Orellana v. Kyle](#), 65 F.3d 29, 31-32 (5th Cir.1995), cert. denied, 516 U.S. 1059, 116 S.Ct. 736, 133 L.Ed.2d 686 (1996) ("it is difficult to see that any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement, will henceforth qualify for constitutional 'liberty' status.... [T]he ambit of [inmates'] due process liberty claims has been dramatically narrowed.").

Indeed, several circuit courts have rejected prisoners' due process claims under *Sandin* where the deprivation complained of was solely confinement in segregated housing. See, e.g., [Pichardo v. Kinker](#), 73 F.3d 612, 613 (5th Cir.1996) (indefinite confinement in administrative segregation for affiliation with gang not atypical and significant under *Sandin*); [Luken v. Scott](#), 71 F.3d 192, 193 (5th Cir.1995), cert. denied, 517 U.S. 1196, 116 S.Ct. 1690, 134 L.Ed.2d 791 (1996) (segregation without more implicates no liberty interest); [Rimmer-Bev v. Brown](#), 62 F.3d 789, 790-91 (6th Cir.1995) (placement in administrative segregation not atypical and significant in context of life sentence).

*4 Several judges in this district have adopted this position. See [Polanco v. Allan](#), No. 93-CV-1498, 1996 WL 377074, at *2 (N.D.N.Y. July 5, 1996) (McAvoy, C.J.) (confinement in a special housing unit (SHU) for up to one year not protected by Due Process Clause); [Figueroa v. Selsky](#), No. 91-CV-510 (N.D.N.Y. Oct. 5, 1995) (Scullin, J.) (seven and one-half months in SHU not protected); [Delaney v. Selsky](#), 899 F.Supp. 923, 927 (N.D.N.Y.1995) (McAvoy, C.J.) (197 days in SHU not protected); [Ocasio v. Coughlin](#), No. 94-CV-530 (N.D.N.Y. Feb. 5, 1996) (Scullin, J.) (180 days in SHU not protected); [Gonzalez v. Coughlin](#), No. 94-CV-1119

(N.D.N.Y. Jan. 10, 1996) (Report-Recommendation of M.J. Hurd) (163 days in keeplock not protected), adopted, (N.D.N.Y. May 6, 1996) (Cholakakis, J.), appeal docketed, No. 96-2494 (2d Cir. June 10, 1996); [Taylor v. Mitchell](#), No. 91-CV-1445 (N.D.N.Y. Feb. 5, 1996) (Cholakakis, J.) (sixty days in SHU not protected); [Cargill v. Casey](#), No. 95-CV-1620, 1996 WL 227859, at *2 (N.D.N.Y. May 2, 1996) (Pooler, J.) (dismissing as frivolous complaint alleging due process violation resulting in keeplock confinement for thirty days). Under these cases, based solely on its duration, plaintiff's confinement in keeplock for sixty days would not constitute a cognizable liberty interest under *Sandin*.

Other circuits, however, have viewed *Sandin* less as a durational, bright line bar to statement of a claim than as an additional issue of fact for litigation. See, e.g., [Bryan v. Duckworth](#), 88 F.3d 431, 433-34 (7th Cir.1996) (question of fact whether disciplinary segregation was atypical and significant under *Sandin*); [Williams v. Fountain](#), 77 F.3d 372, 374 n. 3 (11th Cir.1996) (noting *Sandin* decided by only 5-4 majority and holding that segregation for one year provided basis for assuming atypical and significant deprivation under *Sandin*); [Gotcher v. Wood](#), 66 F.3d 1097, 1101 (9th Cir.1995) (placement in disciplinary segregation presents issue of fact whether it constitutes an atypical and significant deprivation under *Sandin*).

The Second Circuit appears generally to be following the Seventh, Ninth and Eleventh Circuits. The Second Circuit has not yet definitively addressed the effect of *Sandin* on its prior holdings. See [Rodriguez v. Phillips](#), 66 F.3d 470, 480 (2d Cir.1995). It has recently held, however, that *Sandin* does apply retroactively and, it appears, that a plaintiff bears the burden of proving that the deprivation in question imposed an atypical and significant hardship. See [Frazier v. Coughlin](#), 81 F.3d 313, 317 (2d Cir.1996); [Samuels v. Mockry](#), 77 F.3d 34, 37-38 (2d Cir.1996); see also [Giakoumelos v. Coughlin](#), 88 F.3d 56, 62 (2d Cir.1996) (dicta that whether confinement in SHU is "atypical and significant" under *Sandin* presents question of fact). One judge in this district has concluded from these cases that fact-finding is required to resolve whether a deprivation is atypical and significant. Compare [Silas v. Coughlin](#), No. 95-CV-1526, 1996 WL 227857, at *1 (N.D.N.Y. April 29, 1996) (Pooler, J.) (denying motion to dismiss due process claim where plaintiff was confined in SHU for 182 days, holding that Second Circuit's

Not Reported in F.Supp., 1997 WL 160124 (N.D.N.Y.)
(Cite as: 1997 WL 160124 (N.D.N.Y.))

interpretation of *Sandin* mandated further fact-finding as to nature of plaintiff's alleged deprivation from confinement), with *Cargill v. Casey*, *supra* (due process claim based on confinement in keeplock for thirty days dismissed as frivolous).

*5 Under these cases, consideration must be given to whether a plaintiff has established, or raised, a genuine question of fact concerning his disciplinary confinement. Here, plaintiff has raised no question of fact concerning his confinement in keeplock. Plaintiff has not alleged rare, unique or unusual hardships of the kind cited in *Sandin* as examples of atypical and significant deprivations. [515 U.S. at ---, 115 S.Ct. at 2300](#) (transfer to a mental hospital and involuntary administration of psychotropic drugs), or that detention in keeplock imposed a hardship on plaintiff because of his special, unique or unusual condition while incarcerated. *See Delaney v. Selsky*, 899 F.Supp. at 927-28 (question of fact whether confinement in SHU created atypical and significant deprivation for inmate who alleged such confinement caused back problems because of his unusual height of nearly seven feet).

Segregated confinement is a known and usual aspect of incarceration in the New York prison system. *See Sandin v. Conner*, [515 U.S. at ---, 115 S.Ct. at 2301](#) ("Discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law."). The existence of keeplock has been authorized by statute, [N.Y. Correct. Law § 112\(1\)](#) (McKinney 1987), and implemented by DOCS regulations. [N.Y. Comp.Codes R. & Regs. tit. 7, § 301.6 \(1995\)](#). Those regulations describe the conditions and restrictions of confinement in keeplock. *Id.* at pts. 302-05. The deprivations are, therefore, part of the New York prison "regime ... to be normally expected" by one serving a sentence in that system. *Sandin v. Conner*, [515 U.S. at ---, 115 S. Ct. at 2302](#).

Moreover, confinement in keeplock or SHU may result not only from the imposition of discipline, as here. Inmates may also be placed in keeplock or SHU for reasons of administration, [N.Y. Comp.Codes R. & Regs. tit. 7, § 301.4\(b\) \(1995\)](#); protection, *id.* at § 301.5; detention, *id.* at § 301.3; reception, diagnosis and treatment, *id.* at pt. 306; or for any other reason. *Id.* at 301.7(a). The conditions for inmates confined in keeplock,

including plaintiff, are the same regardless of the reason for placement there. *Id.* at pts. 302-05.^{[FN5](#)}

^{[FN5](#)}. Inmates confined for reasons of protection receive somewhat greater privileges. *See, e.g., N.Y. Comp.Codes R. & Regs. tit. 7, § 330.4 (1995)* (three hours per day outside cell).

Inmates in the New York system have no right to be incarcerated in any particular institution, cell or block of cells, nor do they enjoy a right to be housed in the general prison population or to participate in any particular program offered at an institution. *Cf. Meachum v. Fano*, [427 U.S. 215, 226, 96 S.Ct. 2532, 49 L.Ed.2d 451 \(1976\)](#) (no right to remain in particular prison created by state law); *Wolff v. McDonnell*, [418 U.S. 539, 557, 94 S.Ct. 2963, 41 L.Ed.2d 935 \(1974\)](#) (right to good time credits created by state statute). Such matters are committed to the discretion of prison authorities. This grant of broad discretion to prison authorities comports with a principle rationale of *Sandin* that

federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.... Such flexibility is especially warranted in the fine-tuning of the ordinary incidents of prison life, a common subject of prisoner claims....

*6 [515 U.S. at --- - ---, 115 S.Ct. at 2299-2300](#).

Here, plaintiff contends at best that his keeplock confinement was "atypical and significant" under *Sandin* because it subjected him to retaliation, caused closer monitoring by DOCS, affected his transfer to other institutions, and impaired his eligibility for certain prison programs. Pl. Mem. of Law at p. 21. These contentions are conclusory and unsupported in any way. They are also unsworn and unsigned. For these reasons alone, plaintiff's contentions should be rejected as failing to raise any issue of fact under *Sandin*.

On their merits as well, however, these contentions should be rejected. While there may be cases where confinement in keeplock might subject an inmate to retaliation from

Not Reported in F.Supp., 1997 WL 160124 (N.D.N.Y.)
(Cite as: 1997 WL 160124 (N.D.N.Y.))

other inmates or guards such that keeplock confinement imposed “atypical and significant” hardships, no such hardship has been demonstrated here by the non-specific, conclusory assertions of plaintiff. As to the contentions regarding plaintiff’s monitoring status and his eligibility for transfer and prison programs, all concern matters for which plaintiff has no special rights or interests, all were known to follow from disciplinary confinement as a regular part of DOCS’ regime, and plaintiff has asserted no hardship atypical or significant as to him concerning these matters.

For these reasons plaintiff has failed to meet his burden of demonstrating the existence of any factual issue under *Sandin*. Accordingly, defendants’ motion on this ground should be granted.

2. Due Process

Defendants assert that, notwithstanding *Sandin*, plaintiff was not denied due process.

The Due Process Clause requires that an inmate faced with disciplinary confinement has a right to at least twenty-four hours advance notice of the charges against him and to be informed of the reasons for the action taken and the evidence relied upon by the hearing officer. In addition, an inmate has the right to call witnesses and present evidence in his defense “when permitting him to do so would not be unduly hazardous to institutional safety or correctional goals.” *Wolff v. McDonnell*, 418 U.S. 539, 564-66, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *McCann v. Coughlin*, 698 F.2d 112, 121-22 (2d Cir.1983). These rights implicitly include the right to make a statement in the inmate’s defense and the right to marshal the facts. See *Hewitt v. Helms*, 459 U.S. 460, 472, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983); see also *Patterson v. Coughlin*, 761 F.2d 886, 890 (2d Cir.1985), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986).

Where an inmate is illiterate or where the charges are unusually complex, the inmate is entitled to seek the assistance of another inmate or an employee. *Wolff v. McDonnell*, 418 U.S. at 570. The Second Circuit has extended this right, and directed that inmates who are

confined pending a hearing be provided with some form of assistance. *Eng v. Coughlin*, 858 F.2d 889, 897-98 (2d Cir.1988). Corrections officials are required only to provide inmates with the opportunity to exercise these due process rights. See, e.g., *Maid v. Henderson*, 533 F.Supp. 1257, 1273 (N.D.N.Y.), *aff’d*, 714 F.2d 115 (2d Cir.1982) (“although [the inmate] had the right to call witnesses at his hearing, there is no evidence in the record that he ever invoked this right”).

*7 Here, plaintiff argues first that the hearing officer failed to call witnesses in the requested order. However, due process does not mandate that plaintiff be permitted to call his witnesses in a particular order.

Second, plaintiff alleges that the hearing officer failed to conduct an in camera inquiry into the original source of information on which the search was authorized to determine if that source was reliable. However, the issues at the hearing were the results of the search, not the reasons why the search was initiated. The hearing officer’s decision did not rest in any part on the information from the confidential informant. Due process thus did not require inquiry into the reliability of the original information.

Third, plaintiff contends that although the original misbehavior report contains the signatures of both defendant Yule and Officer Rando, his copy reflects only defendant Yule’s signature. However, an inmate has no right to receive a statement of charges signed by any particular official.^{FN6}

^{FN6}. A misbehavior report is to be made by the employee who has observed the incident. Where another employee has personal knowledge of the facts, he shall, where appropriate, endorse his name on the other employee’s report. N.Y. Comp.Codes R. & Regs. tit. 7, § 251-3.1(b) (1995). The misbehavior report here was signed by J. Rando and endorsed by G. Yules as an employee witness, and it is endorsed by the area supervisor. See Defs.’ Statement Pursuant to Rule 7.1(f), Ex. A, p. 1, Inmate Misbehavior Report.

Not Reported in F.Supp., 1997 WL 160124 (N.D.N.Y.)
(Cite as: 1997 WL 160124 (N.D.N.Y.))

Fourth, plaintiff claims that defendant Roberts failed to provide him with various documents plaintiff requested pursuant to New York's Freedom of Information Law after the disciplinary hearing concluded. This claim as well falls outside the scope of the Due Process Clause as described by the cases discussed above. Defendants' failure to provide the requested documents did not violate plaintiff's constitutional right.

Accordingly, defendants' motion should be granted on this ground as well. ^{FN7}

^{FN7}. Throughout his complaint and pleadings, plaintiff refers jointly to his right to due process/equal protection. The facts and arguments in plaintiff's complaint and pleadings point only to a due process claim. No facts or arguments relating to the Equal Protection Clause are asserted. Nevertheless, to the extent plaintiff's complaint is deemed to assert a claim for violation of the Equal Protection Clause, defendants' motion for summary judgment should be granted as to that claim as well.

3. Cell Search

Plaintiff alleges that the search of his cell on October 30, 1995 violated his Fourth Amendment protection against unreasonable searches and seizures. ^{FN8} In Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the Supreme Court held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Id.* at 526. Searches of prison cells, even arbitrary searches, implicate no protected constitutional rights. DeMaio v. Mann, 877 F.Supp. 89, 95 (N.D.N.Y.1995) (Kaplan, J.). Plaintiff thus may assert no cause of action here based on an alleged violation of his Fourth Amendment rights. ^{FN9} Defendants' motion for summary judgment as to claims regarding the search of plaintiff's cell should be granted.

^{FN8}. In his complaint plaintiff also appears to allege that the search violated his Fourteenth Amendment right to due process because he received a receipt for the seizure of the

marijuana five hours after the search was conducted and never received any report of the search. To the extent plaintiff asserts such a claim, summary judgment should be granted to the defendants for the reasons set forth in subsections 1 and 2 above.

^{FN9}. Nor can an inmate recover under section 1983 for intentional destruction of his personal property by a state employee, as long as the state provides a meaningful post-deprivation remedy. Hudson v. Palmer, 468 U.S. at 533. New York provides such a remedy in section 9 of the New York Court of Claims Act. Smith v. O'Connor, 901 F.Supp. 644, 647 (S.D.N.Y.1995). Plaintiff may pursue any claim regarding destruction of his personal property in state court.

4. Qualified Immunity

Defendants argue in the alternative that they are entitled to summary judgment on the ground of qualified immunity.

A government official is entitled to qualified immunity if his or her conduct did not violate "a clearly established" constitutional right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); see also Wright v. Smith, 21 F.3d 496, 500 (2d Cir.1994). The contours of the right must be established to the extent that a reasonable official would recognize his acts violated that right. Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

The following factors must be considered to determine whether a right is clearly established:

*8 (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question, and (3) whether under pre-existing law a reasonable defendant official would have understood that his or her acts were unlawful.

Not Reported in F.Supp., 1997 WL 160124 (N.D.N.Y.)
(Cite as: 1997 WL 160124 (N.D.N.Y.))

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir.1991), cert. denied, 503 U.S. 962, 112 S.Ct. 1565, 118 L.Ed.2d 211 (1992). A determination in favor of a public officer based on qualified immunity is appropriate when, at the time the officer was acting, the right in question was not clearly established or, even if the right was established, it was not objectively reasonable for the official to recognize that his conduct violated the right. Richardson v. Selsky, 5 F.3d 616, 621 (2d Cir.1993); Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir.1993).

Here, among other reasons, the defendants could not reasonably have known that the search of plaintiff's cell violated any of his Fourth Amendment rights or that plaintiff's due process rights were violated by the failure to call witnesses in the order requested by plaintiff. Cf. Walker v. Bates, 23 F.3d 652, 656-57 (2d Cir.1994), cert. denied, 515 U.S. 1157, 115 S.Ct. 2608, 132 L.Ed.2d 852 (1995) (prison disciplinary hearing officer entitled to qualified immunity in suit claiming violation of due process from denial of prisoner's right to call witnesses in disciplinary hearing); Cookish v. Powell, 945 F.2d 441, 449 (1st Cir.1991) (prison official entitled to qualified immunity from charge of violating prisoner's Fourth Amendment rights by conducting body cavity search in view of prison guards of opposite sex). Therefore, the defendants' motion on this ground should be granted.

III. APPOINTMENT OF COUNSEL

Also pending is a renewed application by plaintiff for appointment of counsel (Docket No. 21). A review of the file in this matter reveals that the issues in dispute in this case are not overly complex. Further, there has been no indication that plaintiff has been unable to investigate the critical facts of this case. Finally, no special reason appears why appointment of counsel at this time would be more likely to lead to a just determination of this litigation. Therefore, based upon the existing record in this case, appointment of counsel is unwarranted.^{FN10}

^{FN10} Also pending is plaintiff's motion for a pre-trial conference and evidentiary hearing (Docket No. 23). This motion is untimely and is hereby denied. Plaintiff has also moved for summary judgment by default (Docket No. 11) in

response to defendants' request for an extension of time to answer the complaint. This extension was granted by order dated March 15, 1996 and defendants have answered. Accordingly, it is recommended that this motion be denied as moot.

IV. CONCLUSION

WHEREFORE, for the reasons stated above, it is

RECOMMENDED that defendants' motion for summary judgment be GRANTED; and it is further

RECOMMENDED that plaintiff's motion for summary judgment by default be DENIED; and it is hereby

ORDERED that plaintiff's renewed motion for appointment of counsel is DENIED without prejudice; and it is further

ORDERED that plaintiff's motion for a pre-trial conference and an evidentiary hearing is DENIED; and it is further

ORDERED that the Clerk of the Court serve a copy of this Report-Recommendation and Order, by regular mail, upon the parties to this action.

*9 Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. Roldan v. Racette, 984 F.2d 85, 89 (2d Cir.1993); Small v. Secretary of Health and Human Services, 892 F.2d 15 (2d Cir.1989); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

N.D.N.Y., 1997.
Tinsley v. Greene

Not Reported in F.Supp., 1997 WL 160124 (N.D.N.Y.)
(Cite as: 1997 WL 160124 (N.D.N.Y.))

Not Reported in F.Supp., 1997 WL 160124 (N.D.N.Y.)

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(Cite as: 2007 WL 389003 (E.D.N.Y.))

Background

C Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.
Wayne HARGROVE, Plaintiff,
v.
Sheriff Edward RILEY; Nassau County Correctional
Facility, et al; Nassau County University Medical Staff
and Nassau County Correctional Facility, Defendants.
Civil Action No. CV-04-4587 (DGT).

Jan. 31, 2007.

Wayne Hargrove, Ossining, NY, pro se.

[Alexander V. Sansone](#), Troy & Troy, Lake Ronkonkoma,
NY, [Joseph Carney](#), Mineola, NY, for Defendants.

MEMORANDUM AND ORDER

[TRAGER](#), J.

*1 Inmate Wayne Hargrove ("Hargrove" or "plaintiff") brings this *pro se* action pursuant to [42 U.S.C. § 1983](#) against the Nassau County Sheriff, Nassau County Correctional Facility ("NCCF") and NCCF's medical staff, (collectively, "defendants"), seeking damages for injuries allegedly caused by defendants while he was incarcerated at NCCF. Defendants now move for summary judgment pursuant to [Fed.R.Civ.P. 56](#) arguing, *inter alia*, that Hargrove's claims should be dismissed because he failed to exhaust administrative remedies, as required by the Prison Litigation Reform Act of 1995 ("PLRA"), [42 U.S.C. § 1997e](#). For the following reasons, defendants' motions for summary judgment are granted.

On August 27, 2004,^{[FN1](#)} Hargrove filed a complaint, alleging that defendants violated his civil rights when they forcibly administered purified protein derivative skin tests ("PPD test") to test for latent [tuberculosis](#) ("TB") in April 2002, 2003 and 2004 while he was incarcerated at NCCF. Complaint, Ex. C; Aff. in Opp. at 1-4, Ex. A. Hargrove named Nassau County Sheriff Edward Reilly ("Reilly"), NCCF and Nassau County University Medical Staff^{[FN2](#)} as defendants.^{[FN3](#)} On November 22, 2004, after discovery, County Defendants and NHCC Defendants filed separate motions for summary judgment pursuant to [Fed.R.Civ.P. 56](#). Both defendants properly filed a Local Rule 56.1 Statement and served Hargrove a Notice to *Pro Se* Litigant Opposing Motion for Summary Judgment, pursuant to [Local Civil Rule 56.2](#).

[FN1](#). Hargrove signed the complaint August 27, 2004. The *pro se* clerk's office received and filed the complaint on September 20, 2004. Under the prison mail-box rule, a *pro se* prisoner's complaint is deemed filed when it is delivered to prison authorities. See, e.g., [Walker v. Jastremski](#), 430 F.3d 560, 562 (2d Cir.2005)(deeming *pro se* prisoner's [§ 1983](#) action filed on date complaint was handed to prison officials). There is no evidence in the record as to when Hargrove handed the complaint to prison officials. However, it is clear the operative date is between August 27, 2004 and September 20, 2004. As discussed, *infra*, both of these dates occur before Hargrove properly exhausted the administrative remedies available to him at NCCF.

[FN2](#). The Nassau County University Medical Staff are employed by the Nassau Health Care Corporation ("NHCC"). Pursuant to the Correctional Center Health Services Agreement between the County of Nassau and NHCC, dated September 24, 1999, NHCC provides medical services for inmates at NCCF. County Defs.'s

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

Not. of Motion, Decl., at 1.

[FN3](#). Reilly and NCCF are represented separately from NHCC. Accordingly, when a distinction is necessary, Reilly and NCCF will be referred to as “County Defendants” and Nassau County University Medical Staff and NHCC will be referred to as “NHCC Defendants.”

(1)

Tuberculosis Testing at NCCF

Upon entering NCCF, new prisoners must first go through medical intake. Aff. of Kim Edwards, (“Edwards Aff.”) ¶ 3. This standard process usually takes seventy-two hours. Edwards Aff. ¶ 4. During medical intake, NCCF tests inmates for TB. Aff. of Getachew Feleke (“Feleke Aff.”) ¶ 3. NCCF generally uses a PPD test to detect latent TB. Feleke Aff. ¶ 3. However, if an inmate has previously tested positive for TB, it is NCCF's policy to test for TB using an x-ray instead. [FN4](#) Feleke Aff. ¶ 3. As part of its Infectious Disease Program, NCCF re-tests inmates for TB each year, beginning after they have been housed in that facility for one year. Edwards Aff. ¶ 5.

[FN4](#). According to WebMD, “[a] tuberculin skin test should not be done for people who have a (1) Known TB infection [or a] (2) Positive tuberculin skin test in the past. A second test may cause a more severe reaction to the TB antigens.” Jan Nissl, RN, BS, *Tuberculin Skin Tests*, W E B M D , h t t p : / / www.webmd.com/hw/lab_tests/hw203560.asp (last visited Jan. 31, 2007).

(2)

Hargrove's Tuberculosis Testing at NCCF

On March 15, 2002, Hargrove was incarcerated at NCCF.

NHCC Defs.' 56.1 Statement ¶ 1. Before entering the general population, Hargrove was processed through medical intake. NHCC Defs.' 56.1 Statement ¶ 2. The NCCF Medical Intake Chart for Hargrove, dated March 15, 2002 (“3/15/02 Chart”), shows that Hargrove informed medical staff that he had previously been exposed to [tuberculosis](#). NHCC Defs.' Notice of Mot., Ex. C, at 1; NHCC Defs.' 56.1 Statement ¶ 2. The 3/15/02 Chart also shows that Hargrove reported testing positive to a prior PPD test and that he had been treated for TB in 2000. NHCC Defs.' Notice of Mot., Ex. C, at 1. Hargrove alleges that he was exposed to and treated for TB in 1997. Hargrove's Aff. in Opp. to Mot. for Summary Judgment, (“Aff. in Opp.”), Ex. A at 1-2. Defendants contend that Hargrove was given an x-ray during the medical intake process because of his reported positive PPD test, and that the x-ray was negative, showing no active TB infection. NHCC Defs.' 56.1 Statement ¶ 2; Edwards Aff. ¶ 3. Without specifying a date, Hargrove generally states that his “request to be x-rayed was denied.” Aff. in Opp. at 3.

*2 Pursuant to NCCF's Infectious Disease Program, after being incarcerated in NCCF for a year, Hargrove was scheduled to be re-tested for TB. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. On May 24, 2003, Hargrove was given a PPD skin test. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. This test was negative. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. According to Hargrove, he requested an x-ray instead of a PPD test because of his previous exposure to TB, but was forced to submit to the PPD test. He also alleges that defendants threatened to put him in “keep lock” or “lock up” unless he submitted to the PPD test. [FN5](#) Complaint, Ex. C; Aff. in Opp. at 1-4, Ex. A.

[FN5](#). Hargrove has made contradictory statements about being placed in “keep lock” or “lock up”. It is unclear whether he is alleging that defendants threatened to place him in “lock up” unless he submitted to the PPD test or whether he was actually placed in “lock up” until such time that he agreed to submit to the PPD tests. For example, in his complaint, Hargrove states that when he “refused to submit to another [PPD] test, the Correctional Authorities were brought in and placed [him] in lock up.” Complaint ¶ 4. In a hearing before Magistrate Judge Bloom on

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

January 31, 2005, Hargrove stated that he took the PPD tests because he was told that he would be placed in “lock up” until he submitted to the test. Hr’g Tr. 6:1-18; 9:5-10:10. In Exhibit B to his complaint, Hargrove alleges both that he was given an unwarranted TB shot and that when he refused the same shot he was placed in “keep lock.” Complaint, Ex. B. There is no evidence in the record that Hargrove was ever segregated from the general population while housed at NCCF, outside of the seventy-two hour initial medical intake period. Aff. of Sgt. Neumann (“Neumann Aff.”) at 1-2 (referring to prison records showing Hargrove’s holding locations which demonstrate that he was never placed in “lock up”); NCCF 56.1 Statement ¶ E. Whether or not Hargrove was actually placed in “lock up” is not a material fact for purposes of this motion; as explained in detail, *infra*, Hargrove’s failure to exhaust administrative remedies under the PLRA precludes a consideration of the merits of his [Section 1983](#) claim.

The following year, in June of 2004, Hargrove was scheduled to be retested. Edwards Aff. ¶ 6; NHCC Defs.’ 56.1 Statement ¶ 5. Because of the contradiction between the negative May 2003 PPD test and his reported positive history, NCCF contacted the Infectious Disease Department of the Nassau County Medical Center. Edwards Aff. ¶ 6. It was suggested that Hargrove be given a two-step PPD test, administered fifteen days apart. Feleke Aff. ¶ 4; Edwards Aff. ¶ 6. Hargrove was given these two PPD skin tests in June 2004. Edwards Aff. ¶ 6; NHCC Defs.’ 56.1 Statement ¶ 5. Again, Hargrove alleges that these tests were administered against his will and under threat of being placed in quarantine. Complaint, Exs. A, B; Aff. in Opp., Ex. A.

On December 3, 2004, Hargrove was seen by a physician’s assistant. NHCC Defs.’ 56.1 Statement ¶ 6. During this meeting, Hargrove complained of a dry cough and that the site on his forearm where the June 2004 PPD tests had been administered was red and swollen. NHCC Defs.’ 56.1 Statement ¶ 6; 11/28/04 Sick Call Request.

Hargrove’s December 18, 2004 chart notes a positive PPD

test and an order was placed in the chart that Hargrove not be submitted for future PPD tests. Edwards Aff. ¶ 7; NHCC Defs.’ 56.1 Statement ¶ 8. *See also* 11/19/2004 Grievance.

Hargrove alleges that the following physical ailments were caused by the PPD tests: chronic coughing, [high blood pressure](#), chronic back pain, [lung infection](#), dizzy spells, blurred vision and a permanent scar on both his forearms. Complaint, Ex. C; Aff. in Opp. at 3-4.

(3)

NCCF’s Inmate Grievance Procedure

NCCF has had an inmate grievance program (“IGP”) in place since 2001. Aff. of Kenneth Williams, (“Williams Aff.”), at 2. NCCF’s IGP is carried out in conformance with the New York State Commission of Corrections Minimum Standards and Regulations for Management of County Jails and Penitentiaries (“Minimum Standards”). *Id.*

The IGP is designed to resolve complaints and grievances that an inmate may have regarding the inmate’s care and treatment while incarcerated at NCCF. Williams Aff. at 2. Upon entering NCCF, all inmates receive a copy of the NCCF inmate handbook, which outlines the IGP. *Id.*

*3 The record does not include an actual copy of NCCF’s IGP, but the NCCF’s IGP is detailed in the affidavit of NCCF Investigator Kenneth Williams. [FN6](#) The IGP encourages inmates to resolve their grievances informally with the staff member assigned to the inmate housing unit first. *Id.* If an acceptable resolution cannot be reached, inmates must then proceed through the formal three-step process set out in the IGP. *Id.* at 3.

[FN6.](#) Hargrove does dispute any statements made by Investigator Williams regarding the inmate grievance procedure, time limits or its availability to him. Furthermore, Hargrove does

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

not dispute that he received a handbook outlining the IGP.

The first step requires an inmate to submit his grievance form [FN7](#) to the Inmate Grievance Unit by placing it in a locked box located in each housing area, “within five days of the date of the act or occurrence giving rise to the grievance.” [FN8](#) *Id.* at 2-3. NCCF indexes all grievance forms filed by inmates in a log book and in a computer system. *Id.* at 1, 3. Once a grievance form is received by the Inmate Grievance Unit, the grievance is investigated and the inmate will receive a written determination of the outcome from the Inmate Grievance Coordinator in Section II of the grievance form. [FN9](#) *Id.* at 3. The inmate is then given a choice to accept or appeal the decision by checking the desired selection and signing his name in Section III of the grievance form. *See, e.g.*, 11/19/2004 Grievance form. If the inmate is not satisfied with the decision of the Inmate Grievance Coordinator, the inmate may appeal the determination to the Chief Administrative Officer. Williams Aff. at 3. Finally, if the inmate is not satisfied with the Chief Administrative Officer's determination, the inmate may appeal to the New York State Commission of Correction Citizen's Policy and Complaint Review Council (“Council”). *Id.* at 3. The Council will then render a final determination. *Id.* at 3.

[FN7.](#) The grievance forms contain four sections to be utilized throughout all three steps of the IGP. Section I provides space for the inmate to explain his complaint and the actions he requests as relief. Section II is for the decision of the Inmate Grievance Coordinator. Section III is titled “Acceptance/Appeal of Grievance Coordinator's decision” and contains two mutually exclusive options in which the inmate must choose one or the other: “I have read and accept the Grievance Coordinator's decision,” or “I have read and appeal the Grievance Coordinator's decision.” Section IV provides space for the decision of the Chief Administrative Officer.

[FN8.](#) Hargrove has not argued that he was unaware of this five-day deadline.

[FN9.](#) There is no evidence in the record specifying the how long an inmate has to appeal inaction by the Inmate Grievance Unit.

(4)

Authenticity of the Grievance Forms and Other Documents Submitted by Hargrove

In support of his allegations that he continuously informed defendants that he had been exposed to TB and, therefore, should not have been given PPD tests, Hargrove submitted three letters with his complaint, two of which were addressed to the Inmate Grievance Committee and one of which was addressed to “To whom this may concern.” Complaint, Exs. A-C. He also submitted five complaint letters written to Sheriff Reilly, seventeen sick call requests and nine grievance forms during discovery and with his Affidavit in Opposition to Defendants' Motion for Summary Judgment, explaining that some of the medical records and notarized letters were “missing.” Aff. in Opp, Ex. A at 2. Defendants call the authenticity of most of these documents into question, contending that Hargrove never submitted any grievance form or complaint letter before he filed his complaint. County Defs.' Mem. of Law at 16-21; County Defs.' 56.1 Statement at ¶¶ B2, C3, D3.

Kenneth Williams, an investigator at NCCF in the Inmate Grievance Unit, testified that he reviewed all of the grievance forms, complaint letters and sick call requests annexed to Hargrove's Complaint and to Hargrove's Affidavit in Opposition to Defendants' Motion for Summary Judgment. Williams Aff. at 2. Williams testified that he examined the grievance records at NCCF and searched “for any grievances by plaintiff/inmate Hargrove” and found “only two.” [FN10](#) Williams Aff. at 1. The first grievance, dated November 19, 2004, complained that the medical staff continued “forcing [Hargrove] to take a T.B. shot while [he] keep[s] telling them that [he] has been exposed to T.B.” 11/19/2004 Grievance; Williams Aff. at 1. In response to this grievance, Hargrove's “positive” TB status was noted in his medical records and an order was placed in Hargrove's medical chart, stating that Hargrove not be subjected to future PPD tests. 11/19/2004 Grievance, Section II;

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

Williams Aff. at 1; NHCC Defs.' 56.1 Statement ¶ 8; Edwards Aff. ¶ 7. In Section III of the 11/19/2004 Grievance, Hargrove acknowledged that he had read the Grievance Coordinator's decision, and that he chose to accept the decision instead of appealing it. 11/19/2004 Grievance. The other grievance received by the Grievance Unit, dated May 11, 2005, complained of an unrelated matter. 5/11/2005 Grievance (complaining of back problems and requesting the return of his medical shoes); Williams Aff. at 1. Thus, Williams concluded that, beside the 11/19/2004 and 5/11/2005 Grievance Forms, none of the other documents were "received by the grievance unit, and, given the locked box system, the grievance-forms were never submitted by plaintiff/inmate." Williams Aff. at 2.

FN10. It is NCCF's procedure to forward to the attention of the Grievance Unit all official grievance forms and complaint letters-even ones not specifically addressed to the Grievance Unit. Williams Aff. at 3.

*4 A visual examination of the grievance forms Hargrove submitted in support of his claims suggests forgery. Five of the nine grievance forms were requests to stop PPD testing. *See* April 19, 2002 grievance; April 28, 2002 grievance; April 20, 2003 grievance; April 28, 2003 grievance; November 19, 2004 grievance. The remaining grievance forms concerned Hargrove's requests for medical shoes. *See* March 18, 2002 grievance; July 6, 2002 grievance; February 20, 2003 grievance; May 11, 2005 grievance. Of the grievance forms complaining of unwanted PPD tests, the April 28, 2002 grievance form is a patent photocopy of the April 19, 2002 grievance form, and the April 28, 2003 grievance form is a patent photocopy copy of the April 20, 2003 grievance form, with only the handwritten dates changed. The only potentially authentic grievance forms relating to Hargrove's complaint about the PPD testing are dated April 19, 2002, April 20, 2003, and November 19, 2004. Of these grievance forms, only the November 19, 2004 has been authenticated by NCCF personnel. *See generally* Williams Aff. at 1-4.

Turning to the complaint letters addressed to Reilly, many contain notary stamps cut from the bottom of unrelated

documents and photocopied onto the bottom of the complaint letters. *See* County Defs.' Mem. of Law at 18-21. C.O. Thomas McDevitt and C.O. Paul Klein, both of whom perform notary services for prisoners at NCCF, have submitted sworn affidavits, stating that they kept individual Notary Log Books covering all dates relevant to this litigation. Aff. of C.O. Klein, ("Klein Aff."), at 1; Aff. of C.O. McDevitt, ("McDevitt Aff."), at 1. McDevitt's Notary Log Book shows that he notarized only one document for Hargrove. This document, dated May 13, 2002, was a motion related to Hargrove's criminal trial. McDevitt Aff. at 1-2. Hargrove signed the Notary Log Book acknowledging receipt of that notarized motion. McDevitt Aff. at 2. McDevitt states that he never notarized any other documents for Hargrove. McDevitt Aff. at 2. However, McDevitt's stamp and signature dated May 13, 2002 (the date of the legitimate notarization) appear on Hargrove's letter to Sheriff Reilly dated May 10, 2002. County Defs.' Not. of Motion, Ex. A.

These facts repeat themselves in regard to the documents bearing the notary stamp and signature of Klein. Klein had performed several legitimate notarizations for Hargrove in connection to Hargrove's criminal trial. Klein Aff. at 1-2. Hargrove signed Klein's Notary Log Book acknowledging receipt of those notarized documents. Klein Aff. at 2. However, Klein states that he never notarized any of Hargrove's letters addressed to Sheriff Reilly that bear Klein's stamp and signature. Klein Aff. at 2. On all of the documents that Hargrove submitted bearing Klein's stamp and signature, the dates and signatures of Klein match identically to the dates on which he had performed legitimate notarizations for Hargrove in connection with his criminal trial. Defendants argue it is clear that the documents bearing the stamps and signatures of McDevitt and Klein were not actually notarized by these notaries. County Defs.' Mem. of Law at 17-22.

*5 Hargrove does not deny these allegations. Instead, he resubmits the documents that McDevitt and Klein testify they did not notarize with his Affidavit in Opposition and insists that the documents "refute[] the assertions put forth by the defendants." Aff. in Opp. at 2.

Discussion

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

(1)

Summary Judgment Standard

A motion for summary judgment is granted when “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). A court ruling on a summary judgment motion must construe the facts in the light most favorable to the non-moving party and draw all reasonable inferences in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Williams v. Metropolitan Detention Center, 418 F.Supp.2d 96, 100 (E.D.N.Y.2005). Defendants, the moving party in this action, bear the burden of demonstrating the absence of a genuine issue of material fact. Baisch v. Gallina, 346 F.3d 366, 371 (2d Cir.2003).

As Hargrove is proceeding *pro se*, his complaint must be reviewed carefully and liberally, and be interpreted to “raise the strongest argument it suggests,” Green v. United States, 260 F.3d 78, 83 (2d Cir.2001), particularly when civil rights violations are alleged, *see, e.g.,* McEachin v. McGuinnis, 357 F.3d 197, 200 (2d Cir.2004). Plaintiff's complaint does not specify the legal theories upon which it relies, but, in construing his complaint to raise its strongest arguments, it will be interpreted to raise claims under 42 U.S.C. § 1983. *See, e.g.,* Dufort v. Burgos, No. 04-CV-4940, 2005 WL 2660384, at *2 (E.D.N.Y. Oct. 18, 2005) (liberally construing plaintiff's complaint, which failed to specify the legal theory or theories upon which it rested, as, *inter alia*, a claim under 42 U.S.C. § 1983); Williams, 418 F.Supp.2d at 100 (same).

(2)

Prison Litigation Reform Act

a. Purpose of the Prison Litigation Reform Act

The PLRA was intended to “reduce the quantity and improve the quality of prisoner suits.” Woodford v. Ngo,

--- U.S. ---, 126 S.Ct. 2378, 2387 (2006) (quoting Porter v. Nussle, 534 U.S. 516, 524 (2002)). It seeks to eliminate unwarranted interference with the administration of prisons by federal courts, and thus “ ‘affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.’ ” Woodford, 126 S.Ct. at 2387 (quoting Porter, 534 U.S. at 525). *See also* Booth v. Churner, 532 U.S. 731, 739 (2001). Formal grievance procedures allow prison officials to reconsider their policies, implement the necessary corrections and discipline prison officials who fail to follow existing policy. *See* Ruggiero v. County of Orange, 467 F.3d 170, 177-78 (2d Cir.2006).

b. The Exhaustion Requirement

The PLRA's “invigorated” exhaustion provision, 42 U.S.C. § 1997e(a), provides the mechanism to reduce the quantity and improve the quality of prisoners' suits by requiring that prison officials have the opportunity to address prisoner complaints through internal processes before allowing a case to proceed in federal court. Woodford, 126 S.Ct. at 2382 (citing Porter, 534 U.S. at 524). Section 1997e(a) provides that:

*6 [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

The exhaustion requirement is a mandatory condition precedent to any suit challenging prison conditions, including suits brought under Section 1983. Woodford, 126 S.Ct. at 2383; Ruggiero, 467 F.3d at 174; Williams, 418 F.Supp.2d at 100-01. The exhaustion provision is applicable to suits seeking relief, such as money damages, that may not be available in prison administrative proceedings, as long as other forms of relief are obtainable through administrative channels. Giano v. Goord, 380 F.3d 670, 675 (2d Cir.2004); *see also* Woodford, 126 S.Ct. at 2382-83 (“[A] prisoner must now exhaust

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

administrative remedies even where the relief sought-monetary damages-cannot be granted by the administrative process.”) (citing [Booth, 532 U.S. at 734](#)).

In June 2006, the Supreme Court held that the PLRA requires “proper exhaustion” before a case may proceed in federal court. [Woodford, 126 S.Ct. at 2387](#). “Proper exhaustion” requires a prisoner to use “ ‘all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).’ ” [Ruggiero, 467 F.3d at 176](#) (citing [Woodford, 126 S.Ct. at 2385](#) (emphasis in original)). Although the level of detail necessary to properly exhaust a prison's grievance process will vary from system to system, [Jones v. Bock, 127 S.Ct. 910, 2007 WL 135890, at *12 \(Jan. 22, 2007\)](#), “proper exhaustion” under the PLRA “ ‘demands compliance with [that] agency's deadlines and other critical procedural rules.’ ” [Ruggiero, 467 F.3d at 176](#) (quoting [Woodford, 126 S.Ct. at 2386](#)). Thus, the PLRA's exhaustion requirement is not satisfied by “untimely or otherwise procedurally defective attempts to secure administrative remedies.” [Ruggiero, 467 F.3d at 176](#) (citing [Woodford, 126 S.Ct. at 2382](#)).

(3)

Exhaustion Analysis: Hargrove did not Exhaust the Administrative Remedies Made Available by NCCF prior to Bringing Suit

[Section 1997e\(a\)](#) of the PLRA applies to Hargrove's complaint; Hargrove was and continues to be confined in a correctional facility, see [Berry v. Kerik, 366 F.3d 85, 87 \(2d Cir.2004\)](#), and Hargrove's claim is about a “prison condition” within the meaning of the PLRA, see [Williams, 418 F.Supp.2d at 101](#). See also [Sloane v. W. Mazzuca, No. 04-CV-8266, 2006 WL 3096031, at *4 \(S.D.N.Y. Oct. 31, 2006\)](#) (recognizing PLRA's application to complaint alleging retaliation by prison officials for plaintiff's refusal to consent to a PPD test). Accordingly, the merits of Hargrove's [Section 1983](#) claims can only be addressed if it is first determined that Hargrove properly exhausted each claim under [Section 1997e\(a\)](#) of the PLRA before filing his complaint in federal court.

*7 Hargrove has submitted both forged [FN11](#) and authentic grievance forms in opposing defendants' motions for summary judgment. Excluding, for the moment, the forged documents, NCCF's records reflect that Hargrove did not submit his first grievance until after he filed the instant complaint. Williams Aff. at 1. Hargrove's first grievance complaining of unwanted PPD testing is dated November 19, 2004, Williams Aff. at 1, two to three months after Hargrove filed his complaint. Additionally, this first grievance, dated November 19, 2004, was submitted five months after the last PPD test was administered to him in June 2004. NHCC Defs.' 56.1 Statement ¶¶ 5,6. This five-month period far exceeds the five-day window provided by NCCF's IGP. Since Hargrove failed to comply with the IGP's deadlines, he did not properly exhaust the available administrative remedies. [Ruggiero, 467 F.3d at 176](#) (“ ‘untimely or otherwise procedurally defective attempts to secure administrative remedies do not satisfy the PLRA's exhaustion requirement.’ ”) (quoting [Woodford, 126 S.Ct. at 2382](#)).

[FN11](#). Based on an examination of the documents themselves, as well as the uncontradicted testimony of the notaries performing services for prisoners at NCCF, see generally Klein Aff.; McDevitt Aff., and of the investigator in the Inmate Grievance Unit, see generally Williams Aff., it appears that many of the documents submitted by Hargrove are forgeries. However, in order to view the facts in the light most favorable to Hargrove, and so as to avoid making findings of fact in a summary judgment motion, for the purposes of the exhaustion analysis, all of the documents will be considered to be authentic. However, for purposes of the sanctions analysis, the documents will be explored and the consequences of Hargrove's misrepresentations will be addressed.

Furthermore, even if the falsified grievance forms Hargrove submitted in support of his claim are considered authentic, they are still untimely. The diagnostic TB tests (whether x-ray or PPD tests) were given to Hargrove on March 15, 2002, May 24, 2003 and in June of 2004, but the grievance forms Hargrove submitted complaining of unwanted PPD tests are dated April 19, 2002, April 28, 2002, April 20, 2003, April 28, 2003 and November 19,

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

2004. None of these grievances were filed “within five days of the of the date of the act or occurrence giving rise to the grievance.” Williams Aff. at 3. There is no evidence in the record suggesting that NCCF's IGP allows for a tolling of the five-day time limit in which to file a grievance.^{FN12}

(4)

No Grounds to Excuse Plaintiff's Failure to Exhaust

^{FN12}. Even if the submitted grievances had been filed within the proscribed time period, they only show that Hargrove's grievances reached an Inmate Grievance Coordinator, the first formal step of NCCF's three-step administrative grievance process; Hargrove never appealed to the Chief Administrative Officer. By failing to take the next available step in NCCF's IGP, Hargrove failed to satisfy the mandatory exhaustion requirement. See, e.g., Williams, 418 F.Supp.2d at 101, 102 (dismissing *pro se* complaint where plaintiff could only show he exhausted two of the four-step process mandated by prison's administrative process).

While the letters to Reilly and sick call requests show that Hargrove attempted to bring his complaints about the PPD testing to the attention of the prison staff, see, e.g., Aff. in Opp., Exs. A-D, NCCF's IGP requires use of formal grievance forms. Thus, writing complaint letters and submitting sick call requests did not properly exhaust NCCF's available administrative remedies. See, e.g., Hernandez v. Coffey, No. 99-CV-11615, 2006 WL 2109465, at *4 (S.D.N.Y. July 26, 2006) (holding letters did not satisfy plaintiff's exhaustion obligation); Williams, 418 F.Supp.2d at 101 (holding that because plaintiff's efforts to convey his medical condition through letters and conversations with the warden and medical staff did “not include the required steps of the PLRA's administrative remedy process,” plaintiff failed to exhaust); Mills v. Garvin, No. 99-CV-6032, 2001 U.S. Dist. LEXIS 3333, at *8 (S.D.N.Y. Mar. 2, 2001) (“letter writing is not the equivalent of an exhaustion of administrative remedies under the PLRA”).

As Hargrove failed to properly exhaust his administrative remedies, this action is precluded by 42 U.S.C. § 1997e(a) unless Hargrove can establish excuse for his failure to exhaust.

*8 Exhaustion is an affirmative defense that defendants have the duty to raise. Jones, 2007 WL 135890, at *8-11; Sloane, 2006 WL 3096031, at *4; Williams, 418 F.Supp.2d at 101. Once argued by the defendants, a plaintiff has an opportunity to show why the exhaustion requirement should be excused or why his failure to exhaust is justified. See Ruggiero, 467 F.3d at 175; Collins v. Goord, 438 F.Supp.2d 399, 411 (S.D.N.Y.2006) (“[T]he Second Circuit has cautioned that ‘while the PLRA's exhaustion requirement is ‘mandatory,’ certain caveats apply.’”) (internal citations omitted). Thus, before concluding that a prisoner failed to exhaust available administrative remedies as required by Section 1997e(a) of the PLRA, the following three factors must be considered: (1) whether administrative remedies were actually available to the prisoner; (2) whether defendants have either waived the defense of failure to exhaust or acted in such a way as to estop them from raising the defense; and (3) whether special circumstances, such as a reasonable misunderstanding of the grievance procedures, exist justifying the prisoner's failure to comply with the exhaustion requirement. Ruggiero, 467 F.3d at 175 (citing Hemphill v. New York, 380 F.3d 680, 686 (2d Cir.2004)).^{FN13}

^{FN13}. Courts in the Second Circuit have questioned what effect, if any, the Supreme Court's recent decision in *Woodford* requiring “proper exhaustion” may have on the three-step *Hemphill* inquiry. The Second Circuit has yet to address this issue. See Ruggiero, 467 F.3d at 175-76 (declining to “determine what effect *Woodford* has on our case law in this area ... because [plaintiff] could not have prevailed even under our pre-*Woodford* case law). To date, district courts have acknowledged the tension, but resolved to apply *Hemphill* to exhaustion claims until instructed otherwise by the Second Circuit. See, e.g., Larkins v. Selsky, 04-CV-5900, 2006 WL 3548959, at *9, n. 4 (S.D.N.Y. Dec. 6,

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

[2006](#)) (applying the current law of the Second Circuit to exhaustion claims); [Sloane, 2006 WL 3096031, at *5](#) (“Until such time as the Court of Appeals considers the impact of *Woodford*, if any, on its prior rulings, this Court must follow the law of the Second Circuit. The Court will therefore apply the current law of this circuit to the exhaustion claims.”); [Collins v. Goord, 438 F.Supp.2d at 411 n. 13](#) (acknowledging that *Woodford* and *Hemphill* may be in tension, but deciding exhaustion claims under *Hemphill* inquiry); [Hernandez v. Coffey, No. 99-CV11615, 2006 WL 2109465, at *3 \(S.D.N.Y. July 26, 2006\)](#) (same). Here, Hargrove does not prevail under *Hemphill*; therefore, there is no occasion to address the potential effect *Woodford* may have had in his case.

a. Whether administrative remedies were “available” to Hargrove

The first step in the *Hemphill* inquiry requires a court to determine whether administrative remedies were available to the prisoner. [Hemphill, 380 F.3d at 686](#). The test for assessing availability is an “objective one: that is, would a similarly situated individual of ordinary firmness have deemed them available.” [Id. at 688](#) (internal quotation marks omitted). In making this determination, “courts should be careful to look at the applicable set of grievance procedures.” [Abney v. McGinnis, 380 F.3d 663, 668 \(2d Cir.2004\)](#). Exhaustion may be considered unavailable in situations where plaintiff is unaware of the grievance procedures or did not understand it, [Ruggiero, 467 F.3d at 179](#), or where defendants' behavior prevents plaintiff from seeking administrative remedies,^{FN14} [Hemphill v. State of New York, 380 F.3d 680, 686 \(2d Cir.2004\)](#).

^{FN14}. Case law does not clearly distinguish between situations in which defendants' behavior renders administrative remedies “unavailable” to the plaintiff and cases in which defendants are estopped from asserting non-exhaustion as an affirmative defense because of their behavior. As such, there will be some overlap in the analyses.

Here, Hargrove has not claimed that NCCF's administrative grievance procedure was unavailable to him. In fact, Hargrove demonstrated his access to and knowledge of NCCF's IGP by filing proper grievances on November 19, 2004 and on May 10, 2005. Hargrove did not dispute any part of Investigator Williams's affidavit detailing the IGP and its availability to inmates since 2001. Specifically, Hargrove did not dispute, upon entering the facility, that he received a copy of the inmate handbook outlining the IGP. He has not claimed that he is unfamiliar with or unaware of NCCF's IGP. Hargrove has not alleged that prison officials failed to advance his grievances^{FN15} or that they threatened him or took any other action which effectively rendered the administrative process unavailable.

^{FN15}. Although not specifically alleged, interpreting the evidence to “raise the strongest argument,” Hargrove may be arguing that NCCF's IGP was not available to him because the Grievance Coordinator failed to respond to his grievances. In the single grievance regarding PPD tests that defendants concede is authentic, Hargrove writes, “[n]ow for the third time your office refused to answer my grievances so please look into this matter because the T.B. shot is [sic] effecting my health.” 11/19/04 Grievance. This language implies that Hargrove filed grievances in the past and received no response from the Inmate Grievance Coordinator. Furthermore, Hargrove wrote on one of the submitted copies of the November 19, 2004 grievance that “[t]his is the only accepte[sic] that Plaintiff got back from all grievances and letters that the Plaintiff sent to Sheriff Riley and his medical staffs about his staff making [sic] take T.B. test for 3 year[s].” County Defs.' Not. of Motion, Ex. A, 11/19/2004 grievance.

First, it must be reiterated that filing of the initial grievances was untimely. However, even assuming *arguendo* that the original grievances had been timely filed, district courts in the Second Circuit have held that the “lack of a response from the [Inmate Grievance Review Committee] does not excuse an inmate's obligation to exhaust his

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

remedies through available appeals.” [Hernandez v. Coffey](#), 2006 WL 2109465, at *3-5. See also [Hemphill](#), 380 F.3d at 686 (“Threats or other intimidation by prison officials may well deter a prisoner of ‘ordinary firmness’ from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system”); [Acosta v. Corr. Officer Dawkins](#), No. 04-CV-6678, 2005 WL 1668627, at *3 (S.D.N.Y. July 14, 2005) (inmate required to appeal lack of response to exhaust administrative remedies); [Mendoza v. Goord](#), No. 00-CV-0146, 2002 U.S. Dist. LEXIS 22573, at *6 (S.D.N.Y. Nov. 21, 2002) (“If, as a result of a negligent error by prison officials-or even their deliberate attempt to sabotage a prisoner’s grievance-the prisoner [does not receive a response] on his complaint, he is not thereby forestalled from appealing”). Hargrove did not assert or offer evidence suggesting that he appealed the unresponsiveness or that those appeals were not advanced.

*9 Additionally, Hargrove’s transfer from NCCF to Sing Sing Correctional Facility (“Sing Sing”) in July 2005 did not excuse his previous failure to properly exhaust. See, e.g., [Sims v. Blot](#), No. 00-CV-2524, 2003 WL 21738766, at *4 (S.D.N.Y. July 25, 2003) (determining that failure to exhaust administrative remedies is not excused by transfer to another facility); [Santiago v. Meinsen](#), 89 F.Supp.2d 435, 440-41 (S.D.N.Y.2000) (determining that plaintiff should not be “rewarded” for failing to participate in grievance procedure before being transferred). Hargrove had ample opportunity to properly file his grievances and to appeal their results as required by NCCF’s procedures while he was imprisoned at NCCF. The last PPD test Hargrove complains of was given in 2004; therefore, Hargrove had until June or July of 2004 to timely file his grievance in accordance with NCCF’s IGP. Hargrove was not transferred to Sing Sing until July 2005. County Defs.’ Mem. of Law at 2. Thus, Hargrove’s transfer cannot excuse his previous failure to properly exhaust.

b. Estoppel

The second step of the inquiry asks whether defendants are estopped from raising exhaustion as a defense. Specifically, “whether the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it, or whether the defendants’ own actions inhibiting the inmate’s exhaustion of remedies may estop one or more of the defendants from raising the plaintiff’s failure to exhaust as a defense.” [Hemphill](#), 380 F.3d at 686 (internal citations omitted).

Here, Hargrove has not made any statements that would permit a finding that defendants should be estopped from raising the affirmative defense of exhaustion or that defendants waived the right to raise the defense. Defendants first raised the PLRA’s exhaustion requirement as an affirmative defense in their respective answers. See County Defs.’ Am. Answer at 3; NHCC Defs.’ Answer at 1. County Defendants raised it again in their motion for summary judgment. See County Defs.’ Mem of Law at 15-23. Thus, defendants are not estopped from raising the affirmative defense now. See, e.g., [Sloane](#), 2006 WL 3096031, at *8 (exhaustion defense not waived where defendants first raised it in their motion to dismiss).

Additionally, defendants have not threatened Hargrove or engaged in other conduct preventing him from exhausting the available administrative remedies. Cf. [Ziemba v. Wezner](#), 366 F.3d 161, 162 (2d Cir.2004) (holding defendants were estopped from asserting non-exhaustion because of prison officials’ beatings, threats and other conduct inhibiting the inmate from filing proper grievances); [Feliciano v. Goord](#), No. 97-CV-263, 1998 WL 436358, at *2 (S.D.N.Y. July 27, 1998) (holding defendants were estopped from asserting non-exhaustion where prison officials refused to provide inmate with grievance forms, assured him that the incidents would be investigated by staff as a prerequisite to filing a grievance, and provided prisoner with no information about results of investigation). Hargrove has not argued otherwise. See [Ruggiero](#), 467 F.3d at 178 (holding defendants were not estopped from asserting a failure to exhaust defense where plaintiff pointed to no affirmative act by prison officials that would have prevented him from pursuing administrative remedies); [Sloane](#), 2006 WL 3096031, at *8 (finding no estoppel where plaintiff did not argue that defendants prevented him from pursuing the available administrative remedies); [Hernandez](#), 2006 WL 2109465,

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

at *4 (finding no estoppel where plaintiff did not argue that any threats or intimidation prevented him from pursuing his appeals). Thus, for the same reasons that administrative remedies were not deemed unavailable to Hargrove, defendants are not estopped from raising a failure to exhaust defense.

c. Special circumstances

*10 Even where administrative remedies are available and the defendants are not estopped from arguing exhaustion, the court must “consider whether ‘special circumstances’ have been plausibly alleged that justify ‘the prisoner’s failure to comply with administrative procedural requirements.’” *Hemphill*, 380 F.3d at 688 (quoting *Giano*, 380 F.3d at 676). For example, plaintiff’s reasonable interpretation of regulations differing from prison official’s interpretation has been held to constitute a “special circumstance.” *Giano*, 380 F.3d at 676-77. No special circumstances have been alleged that would excuse Hargrove from availing himself of administrative remedies. See *Sloane*, 2006 WL 3096031, at *8; *Freeman v. Goord*, No. 02-CV-9033, 2004 U.S. Dist. LEXIS 23873, at *9-10 (S.D.N.Y.2004) (granting motion to dismiss where “there is no evidence in the record ••• of any ‘special circumstances’ in this action.”)

(5)

Hargrove's Failure to Exhaust, in Addition to his Fraud on the Court, Warrants Dismissal with Prejudice

Hargrove has not sufficiently rebutted the defendants’ assertion of failure to exhaust, and a liberal reading of his submissions does not reveal any grounds to excuse that failure.

Because Hargrove filed a complaint in federal court before filing a grievance, permitting his unexhausted and unexcused claim to proceed would undercut one of the goals of the exhaustion doctrine by allowing NCCF to be haled into federal court without the “opportunity to correct

its own mistakes with respect to the programs it administers.” *Woodford*, 126 S.Ct. at 2385. See also *Ruggiero*, 467 F.3d at 178 (citing *Porter*, 534 U.S. at 525). Thus, his complaint must be dismissed.

In general, dismissal without prejudice is appropriate where plaintiff has failed to exhaust but the time permitted for pursuing administrative remedies has not expired. *Berry v. Kerik*, 366 F.3d 85, 87 (2d Cir.2004). Dismissal with prejudice is appropriate where “administrative remedies have become unavailable after the prisoner had ample opportunity to use them and no special circumstances justified failure to exhaust.” *Berry*, 366 F.3d at 88. Here, Hargrove’s administrative remedies were available to him during his entire period of confinement at NCCF. He remained incarcerated in NCCF throughout the time period in which he alleges the PPD tests were given. He could have exhausted remedies for his grievances at any time. Therefore, Hargrove had ample opportunity to seek administrative remedies but failed to do so. Because there is no evidence in the record that administrative remedies are still available to Hargrove, as the five-day time period had run, and because Hargrove has alleged no special circumstances justifying his failure to exhaust, his complaint is accordingly dismissed with prejudice. *Berry*, 366 F.3d at 88 (upholding dismissal with prejudice where plaintiff had no justification for his failure to pursue administrative remedies while they were available.)

*11 Additionally, defendants’ have moved for sanctions based on Hargrove’s alleged submission of falsified evidence. If a party commits a fraud on the court, the court has the inherent power to do whatever is reasonably necessary to deter abuse of the judicial process. *Shangold v. The Walt Disney Co.*, No. 03-CV-9522, 2006 WL 71672, at *4 (S.D.N.Y. January 12, 2006) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)). Fraud upon the court has been defined as “fraud which seriously affects the integrity of the normal process of adjudication.” *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir.1988); *McMunn v. Mem’l Sloan-Kettering Cancer Center*, 191 F.Supp.2d 440, 445 (S.D.N.Y.2002). In order for a court to grant sanctions based upon fraud, it must be established by clear and convincing evidence that a party has “sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by ... unfairly hampering

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

the presentation of the opposing party's claim or defense.”
[McMunn](#), 191 F.Supp.2d at 455 (quoting [Aoude v. Mobil Oil Corp.](#), 892 F.2d 1115, 1119 (1st Cir.1989)).

After carefully reviewing the allegedly fraudulent documents, it must be concluded that Hargrove consciously falsified these documents. *See, e.g., Shangold*, 2006 WL 71672, at *1, *3 (finding clear and convincing evidence of fraud where plaintiffs fabricated a timeline and plot outlines to advance their claims); [McMunn](#), 191 F.Supp.2d at 446 (finding clear and convincing evidence of fraud where plaintiff edited audio tapes and represented that they were unedited during discovery). The notaries performing services for prisoners at NCCF testify that they never notarized many of the documents supplied by Hargrove. *See* Klein Aff.; McDevitt Aff. Furthermore, a visual examination of the documents themselves makes it clear that many of the documents submitted by Hargrove are forgeries.

In considering what sanction to impose, courts consider the following five factors: (i) whether the misconduct was the product of intentional bad faith; (ii) whether and to what extent the misconduct prejudiced the plaintiffs; (iii) whether there was a pattern of misbehavior rather than an isolated instance; (iv) whether and when the misconduct was corrected; and (v) whether further misconduct is likely to occur in the future. [Scholastic, Inc. v. Stouffer](#), 221 F.Supp.2d 425, 444 (S.D.N.Y.2002) (citing [McMunn](#), 191 F.Supp.2d at 461).

Here, Hargrove's deception was not an isolated instance; he fabricated the dates on many grievance forms, in addition to improperly duplicating notary stamps on complaint letters to make them look authentic. Klein Aff. at 2; McDevitt Aff. at 2; County Defs.' 56.1 Statement ¶¶ C3, D3. He submitted these forgeries to defendants during discovery and again as exhibits to his Affidavit in Opposition to Defendant's Motion for Summary Judgment. A severe sanction is warranted as Hargrove's forgeries were intentional, he never corrected them once their authenticity was challenged and he continues to insist on their veracity. Aff. in Opp. at 1-4. Given that there is clear and convincing evidence that Hargrove has continuously and consciously perpetrated a fraud on the court through his submission of fraudulent documents and sworn

affirmations of those documents' authenticity, dismissal with prejudice is especially appropriate. *See, e.g., Shangold*, 2006 WL 71672, at *5 (dismissing with prejudice where plaintiffs fabricated evidence to advance their claims); [Scholastic](#), 221 F.Supp.2d at 439-444 (dismissing with prejudice where plaintiff produced seven pieces of falsified evidence); [McMunn](#), 191 F.Supp.2d at 445 (dismissing with prejudice where plaintiff “lie[d] to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process”).

Conclusion

*12 Because Hargrove did not satisfy the exhaustion requirement under the PLRA, defendants' motions for summary judgment are granted. Further, considering the fraud Hargrove perpetrated on the court, the claims are dismissed against all defendants with prejudice. The Clerk of the Court is directed to close the case.

SO ORDERED:

E.D.N.Y., 2007.
Hargrove v. Riley
Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2006 WL 2639369 (N.D.N.Y.)
(Cite as: 2006 WL 2639369 (N.D.N.Y.))

C

Only the Westlaw citation is currently available.

United States District Court,
N.D. New York.
James PETTUS, Plaintiff,
v.

Jospeh McCOY, Superintendent, Deputy Ryan,
Defendants.
No. 9:04-CV-0471.

Sept. 13, 2006.

James Pettus, Comstock, NY, pro se.

[Charles J. Quackenbush](#), New York State Attorney
General, The Capitol Albany, NY, for Defendants.

DECISION and ORDER

[THOMAS J. McAVOY](#), Senior District Judge.

*1 Plaintiff commenced the instant action asserting various violations of his constitutional rights arising out of his placement at the Southport Correctional Facility. In his Complaint, Plaintiff alleges that he was improperly sent to the Special Housing Unit ("SHU") at a maximum security facility and that being in SHU has put his life in jeopardy. Currently before the Court is Defendants' motion for summary judgment pursuant to [Fed.R.Civ.P. 56](#) seeking dismissal of the Complaint in its entirety for failure to exhaust administrative remedies.

I. FACTS^{[FN1](#)}

^{[FN1](#)}. The following facts are taken from Defendants' statement of material facts submitted

pursuant to N.D.N.Y.L.R. 7.1(a)(3). These facts are deemed admitted because they are supported by the record evidence and Plaintiff failed to submit an opposing statement of material facts as required by Rule 7.1(a)(3). Plaintiff was specifically advised by Defendants of his obligation to file an opposing statement of material facts and to otherwise properly respond to the motion for summary judgment.

Plaintiff is an inmate in the custody of the New York State Department of Correctional Services. Plaintiff signed the instant Complaint on April 7, 2004. On his Complaint form, Plaintiff indicated that there is a grievance procedure available to him and that he availed himself of the grievance procedure by filing a complaint with the IGRC ^{[FN2](#)}, followed by an appeal to the superintendent of the facility, and then to the Central Office Review Committee in Albany. The Complaint indicates that Plaintiff is "waiting for response from Albany." The Complaint was filed on April 27, 2004.

^{[FN2](#)}. Inmate Grievance Review Committee.

On April 12, 2004, prior to the filing of the instant Complaint, Plaintiff filed a grievance relating to the issues presented in this case. On April 19, 2004, the IGRC recommended that Plaintiff's grievance be denied. Plaintiff then appealed that decision to the facility Superintendent. In the meantime, on April 27, Plaintiff commenced the instant litigation. On May 3, 2004, after Plaintiff filed the Complaint in this case, the Superintendent denied Plaintiff's grievance. On May 5, 2004, Plaintiff appealed the decision to the Central Office Review Committee in Albany. On June 23, 2004, the Central Office Review Committee denied Plaintiff's appeal. Plaintiff did not file any other grievances in connection with the matters raised in this lawsuit.

Defendants now move to dismiss on the ground that Plaintiff commenced the instant action before fully exhausting his available administrative remedies.

Not Reported in F.Supp.2d, 2006 WL 2639369 (N.D.N.Y.)
(Cite as: 2006 WL 2639369 (N.D.N.Y.))

II. DISCUSSION

The sole issue presented is whether Plaintiff was required to complete the administrative process before commencing this litigation. This issue has already been addressed by the Second Circuit in [Neal v. Goord, 267 F.3d 116 \(2d Cir.2001\)](#). The issue in that case was “whether plaintiff’s complaint should have been dismissed despite his having exhausted at least some claims during the pendency of his lawsuit.” [Id. at 121](#). The Second Circuit held that “exhausting administrative remedies after a complaint is filed will not save a case from dismissal.” *Id.*

In this case, Defendants have established from a legally sufficient source that an administrative remedy is available and applicable. [Mojias v. Johnson, 351 F.3d 606, 610 \(2d Cir.2003\)](#); *see also* 7. N.Y.C.R.R. § 701.1, *et seq.* Plaintiff’s Complaint concerns his placement in SHU at a maximum security facility. These are matters that fall within the grievance procedure available to NYSDOCS inmates and are required to be exhausted under the Prison Litigation Reform Act, [42 U.S.C. § 1997e](#). Plaintiff has failed to demonstrate any applicable exception to the exhaustion requirement. Because Plaintiff commenced the instant litigation prior to fully completing the administrative review process, the instant Complaint must be dismissed without prejudice. [Neal, 267 F.3d 116](#).

III. CONCLUSION

***2** For the foregoing reasons, Defendants’ motion for summary judgment is GRANTED and the Complaint is DISMISSED WITHOUT PREJUDICE. The Clerk of the Court shall close the file in this matter.

IT IS SO ORDERED.

N.D.N.Y.,2006.
Pettus v. McCoy
Not Reported in F.Supp.2d, 2006 WL 2639369
(N.D.N.Y.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.)
(Cite as: 2004 WL 324898 (S.D.N.Y.))

H

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
William MINGUES, Plaintiff,
v.
C.O NELSON and C.O. Berlingame, Defendants.
No. 96 CV 5396(GBD).

Feb. 20, 2004.

Background: Inmate brought a § 1983 action asserting, inter alia, claims of excessive force during his wife's visit with him at the correctional facility.

Holding: On a defense motion to dismiss, the District Court, [Daniels](#), J., held that the record established that the action was filed after the effective date of the Prison Litigation Reform Act (PLRA). Motion granted.

West Headnotes

Civil Rights 78 1395(7)

[78](#) Civil Rights

[78III](#) Federal Remedies in General

[78k1392](#) Pleading

[78k1395](#) Particular Causes of Action

[78k1395\(7\)](#) k. Prisons and Jails; Probation and Parole. [Most Cited Cases](#)

Record established that inmate's § 1983 action was filed after the effective date of the Prison Litigation Reform Act of 1996 (PLRA), such that the inmate's failure to exhaust his administrative remedies precluded relief; examination of the initial complaint itself, on its face, unequivocally demonstrated that the inmate's subsequent allegation in his amended complaint that he filed the complaint in April of

1996 was patently false; there was no explanation offered that could reasonably support and account for the existence of May dates on the complaint. [42 U.S.C.A. § 1983](#); Civil Rights of Institutionalized Persons Act, § 7(a), [42 U.S.C.A. § 1997e\(a\)](#).

MEMORANDUM DECISION AND ORDER

[DANIELS](#), J.

*1 This [§ 1983](#) action was originally commenced by the plaintiff, ^{FN1}a prisoner in New York State custody, and his wife claiming their civil rights were violated during the wife's visit with plaintiff at the correctional facility. Discovery in this matter has concluded. Previously, all claims asserted by plaintiff's wife were dismissed for failure to prosecute. Additionally, defendants' summary judgment motion was denied with respect to plaintiff's claims of excessive force, ^{FN2} and summary judgment was granted dismissing all of plaintiff's other claims. Defendants now seek to dismiss the remaining excessive force claims on the grounds they are barred by the Prisoner Litigation Reform Act of 1996 ("PLRA"), [42 U.S.C. § 1997e\(a\)](#), as plaintiff failed to exhaust his administrative remedies.

^{FN1}. Plaintiff and his wife were proceeding *pro se* when they filed the complaint and amended complaint. Thereafter, plaintiff obtained legal representation.

^{FN2}. In the amended complaint, plaintiff alleges he was beaten, kicked and punched. (Am.Compl. § 6). In his original complaint, he had also claimed that he was whipped." (Compl. at 7, 8). Plaintiff testified at his deposition that he was slapped once in the face, punched about four or five times in the lower back, and a correctional officer then laid on top of him. (Mingues Dep. at 78-81). The incident, which took approximately thirty to forty seconds, caused plaintiff to suffer from back pain for an unspecified period of time. (*Id.* at 81, 86).

Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.)
(Cite as: 2004 WL 324898 (S.D.N.Y.))

Subdivision (a) of [§ 1997e](#) provides, “[n]o action shall be brought with respect to prison conditions under [section 1983](#) of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” This provision became effective on April 26, 1996. [Blisset v. Casey](#), 147 F.3d 218, 219 (2d Cir.1998). The PLRA’s exhaustion requirement does not apply retroactively to actions pending when the Act was signed into law. [Scott v. Coughlin](#), 344 F.3d 282, 291 (2d Cir.2003).

There is no dispute that plaintiff did not avail himself of the existing and available prison grievance procedure. Plaintiff, however, argues he was not required to exhaust his administrative remedies because, as alleged in his amended complaint, “petitioners (sic) had already filed in April 10-12 of 1996,” prior to the PLRA’s April 26, 1996 enactment date.^{FN3} (Am.Compl. § 2). In order to determine the date that the instant action was commenced, the date of the filing of the amended complaint relates back to the filing date of the original complaint. [Fed.R.Civ.P. 15\(c\)](#). The original complaint was signed and dated by plaintiff’s wife on May 8, 1996; it was stamped received by the Pro Se Office on May 10, 1996; and plaintiff’s signature is dated May 13, 1996.^{FN4}

[FN3](#). The amended complaint reads as follows:

That the original complaint filed under and pursuant to [Title 42 section 1983](#) and [1985](#) was made and submitted before this court in April of 1996, before the application of the Prisoner Litigation Reform Act of 1996 was signed into law. The Act was signed into law April 26, 1996 and petitioners had already filed in April 10-12 of 1996. (Am.Compl. § 2).

[FN4](#). Plaintiff’s wife application for *in forma pauperis* relief was signed and dated May 8, 1996, and it is stamped as received by the Pro Se Office on May 10, 1996. Plaintiff’s signature, on his initial application for appointment of counsel, is dated May 13, 1996, and it is stamped as

received by the Pro Se Office on May 10, 1996. Attached to plaintiff’s application, is his signed Affirmation of Service, also dated May 13, 1996, wherein plaintiff declared under penalty of perjury that he served his application upon the Pro Se Office. Plaintiff alleges that “between April 17, 1996 until October 7, 1996,” all visitation was suspended between him and his wife and that their “only form of communications was correspondence.” (Am.Compl. § 7).

The matter was referred to Magistrate Judge Pitman for a Report and Recommendation (“Report”). Although the magistrate judge found that the three earliest possible dates that the evidence demonstrates the complaint could have been filed, *i.e.*, May 8th, 10th, and 13th of 1996, were all beyond the PLRA enactment date, he nevertheless recommended that the motion to dismiss be denied based on plaintiff’s allegation in the amended complaint that he filed the original complaint April 10-12 of 1996, prior to the April 26, 1996 enactment date. The magistrate judge found that, “[i]n light of the express allegation in the Amended Complaint that plaintiff commenced the action before April 26, 1996 and the absence of a clear record to the contrary, the requirement that disputed factual issues be resolved in plaintiff’s favor for purposes of this motion requires that the motion be denied.” (Report at 12-13).

*2 Defendants object to the Report’s conclusion that there is a material issue of fact regarding the date the action was filed. Plaintiff’s attorney did not file any objections.^{FNS} The Court must make a *de novo* determination as to those portions of the Report to which there are objections. [Fed.R.Civ.P. 72\(b\)](#); [28 U.S.C. § 636\(b\)\(1\)\(C\)](#). It is not required that the Court conduct a *de novo* hearing on the matter. [United States v. Raddatz](#), 447 U.S. 667, 676, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Rather, it is sufficient that the Court “arrive at its own, independent conclusion” regarding those portions to which the objections were made. [Nelson v. Smith](#), 618 F.Supp. 1186, 1189-90 (S.D.N.Y.1985) (quoting [Hernandez v. Estelle](#), 711 F.2d 619, 620 (5th Cir.1983)). Accordingly, the Court, in the exercise of sound judicial discretion, must determine the extent, if any, it should rely upon the magistrate judge’s proposed findings and recommendations. [Raddatz](#), 447 U.S. at 676. The Court may accept, reject or modify, in whole or in part, the findings and recommendations set forth within the Report. [Fed.R.Civ.P. 72\(b\)](#); [28 U.S.C. §](#)

Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.)
(Cite as: 2004 WL 324898 (S.D.N.Y.))

[636\(b\)\(1\)\(C\)](#). Where there are no objections, the Court may accept the Report provided there is no clear error on the face of the record. [Nelson v. Smith](#), 618 F.Supp. at 1189; see also [Heisler v. Kralik](#), 981 F.Supp. 830, 840 (S.D.N.Y.1997), *aff'd sub nom.* [Heisler v. Rockland County](#), 164 F.3d 618 (2d Cir.1998).

[FN5](#). Plaintiff himself filed objections which was not adopted by his counsel. Plaintiff objects to the magistrate judge's finding that an issue exists as to when plaintiff filed the complaint because plaintiff asserts he gave it to prison officials to be mailed in April. Additionally, plaintiff objects to the magistrate judge's suggestion that the defendants convert their motion to one for summary judgment asserting the same theory as set forth in the present motion. Since this Court finds that the instant motion is meritorious, the propriety of plaintiff personally submitting his own objections need not be address as those objections are moot.

Upon a *de novo* review, the Report's recommendation that the motion be denied is rejected by the Court. [Section 1997e \(a\)](#) requires that inmates exhaust all available administrative remedies prior to the commencement of a [§ 1983](#) action concerning prison conditions, and failure to do so warrants dismissal of the action. [Porter v. Nussel](#), 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002); [Scott](#), 344 F.3d at 290. The exhaustion of one's administrative remedies, however, is not a jurisdictional requirement under the PLRA. [Richardson v. Goord](#), 347 F.3d 431 (2d Cir.2003). A defendant may assert a non-exhaustion claim as an affirmative defense. [Jenkins v. Haubert](#), 179 F.3d 19, 28-29 (2d Cir.1999). Since it is an affirmative defense, defendants bear the burden of proof in this regard. See, [McCoy v. Goord](#), 255 F.Supp.2d 233, 248 (S.D.N.Y.2003); [Arnold v. Goetz](#), 245 F.Supp.2d 527, 534-35 (S.D.N.Y.2003); [Reyes v. Punzal](#), 206 F.Supp.2d 431, 433 (W.D.N.Y.2002). A motion to dismiss, pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#), is an appropriate vehicle to be used by a defendant where the failure to exhaust is clear from the face of the complaint as well as any written instrument attached as an exhibit and any statements or documents incorporated by reference into the complaint. See, [Scott v. Gardner](#), 287 F.Supp.2d 477, 485 (S.D.N.Y.2003) (citation omitted); [McCoy](#), 255 F.Supp.2d at 249.

In the amended complaint, plaintiff alleges, in a conclusory manner, that he filed the original complaint before the effective date of the PLRA, sometime between April 10th and April 12th of 1996.^{[FN6](#)} On a motion to dismiss pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#), the court must accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inference in plaintiff's favor. [Resnick v. Swartz](#), 303 F.3d 147, 150-51 (2d Cir.2002) (citation omitted); [Bolt Elec., Inc. v. City of New York](#), 53 F.3d 465, 469 (2d Cir.1995). Dismissal is only warranted where it appears without doubt that plaintiff can prove no set of facts supporting his claims that would entitle him to relief. [Harris v. City of New York](#), 186 F.3d 243, 247 (2d Cir.1999). The court's consideration is not limiting solely to the factual allegations set forth in the amended complaint. Rather, the court may also consider documents attached to the complaint as exhibits or incorporated in it by reference, matters of which judicial notice may be taken, or to documents either in plaintiff's possession or of which he has knowledge of and relied on in bringing the action. [Brass v. American Film Technologies, Inc.](#), 987 F.2d 142, 150 (2d Cir.1993) (citation omitted). The court is not bound to accept as true a conclusory allegation where the pleadings are devoid of any specific facts or circumstances supporting such an assertion. [DeJesus v. Sears, Roebuck & Co., Inc.](#), 87 F.3d 65, 70 (2d Cir.1996). Nor must the court "ignore any facts alleged in the complaint that undermine the plaintiff's claim." [Roots Partnership v. Lands' End, Inc.](#), 965 F.2d 1411, 1416 (7th Cir.1992) (citation omitted).

[FN6](#). In response to then Chief Judge Thomas P. Griesa's 1996 order dismissing this action, plaintiff filed an Application for Reconsideration, dated October 28, 1996, wherein he claims that "on April 12, 1996 this petitioner filed a 1983 civil suit ..." (Pl.'s Mot. for Recons. at 1).

*3 Plaintiff fails to allege any factual basis in support of his claim that he filed the initial complaint between April 10-12, 1996. The Court is not required to accept this statement as a well-pleaded factual allegation in light of the existing record which clearly demonstrates that such an allegation is not only factually unsupported by the clear evidence, but is factually impossible. Generally, an

Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.)
(Cite as: 2004 WL 324898 (S.D.N.Y.))

amended complaint supersedes the original complaint, and renders it of no legal effect. *In re. Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir.2000). In plaintiff's amended complaint, he states that he is submitting the amended complaint in support of his original complaint. Hence, the original complaint is incorporated by reference in the amended complaint, and may be considered by the Court. Even if the initial complaint was not so incorporated, given the circumstances of this case, the Court would nevertheless consider it as it relates to the original date of filing. An examination of the initial complaint itself, on its face, unequivocally demonstrates that plaintiff's subsequent allegation in his amended complaint that he filed the complaint between April 10th and 12th of 1996 is patently false.

The original complaint refers to plaintiff's prison disciplinary hearing arising out of the same incident forming the basis of the present lawsuit. Generally, the disciplinary charges against plaintiff were in connection with an alleged conspiracy by him and his wife to commit grand larceny against inmate Robert Cornell. That hearing began on April 16, 1996, and concluded on April 19, 1996. (Defs.' Notice of Mot. for Summ. J. Ex. N, Transcript of Disciplinary Hr'g, conducted on April 16, 18-19, 1996). Specifically, in the original complaint, plaintiff refers to the testimony given by this fellow inmate.^{FN7} (Compl. at 8). That inmate testified on April 19th. (Hr'g. Tr. at 53-54, 57). Thus, plaintiff's claim that he filed the complaint between April 10-12, 1996, is absolutely impossible as the initial complaint refers to events occurring after that time period. Merely because plaintiff boldly alleges in his amended complaint that he filed the original complaint between April 10th and 12th does not require this Court to turn a blind eye to plaintiff's prior pleadings demonstrating the absurdity of his claim.^{FN8} *See, Silva Run Worlwide Ltd. v. Gaming Lottery Corp.*, 2001 WL 396521, *1 (S.D.N.Y. April 19, 2001) (citations omitted) (A court should not "accept allegations that are contradicted or undermined by other more specific allegations in the complaint or by written materials properly before the court.").

^{FN7}. In the complaint, plaintiff alleges "that at his S.H.U. hearing petitioner called as a witness Robert Cornell who stated that this petitioner Mingues nor his wife (co-petitioner) Narvaez ever took any money from him. (Compl. at 8).

^{FN8}. At his deposition, plaintiff testified that he filed the initial complaint "[a]pproximately around June of 1996." (Mingues Dep. at 37-38).

Lawsuits by inmates represented by counsel are commenced when the complaint is filed with the court. *See, Fed.R.Civ.P. 3, 5(e)*. For *pro se* litigants, who are not imprisoned and have been granted *in forum pauperis* relief, their complaints are deemed filed when received by the Pro Se Office. *See, Toliver v. County of Sullivan*, 841 F.2d 41 (2d Cir.1998). The complaint of a *pro se* prisoner, however, is deemed filed when he or she gives the complaint to prisoner officials to be mailed. *Houston v. Lack*, 487 U.S. 266, 270, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988); *Dory v. Ryan*, 999 F.2d 679, 682 (2d Cir.1993), *modified on other grounds*, 25 F.3d 81 (2d Cir.1994). The "prison mailbox" rule is designed to combat inmate litigants' dependence on the prison facility's mail system and their lack of counsel so as to assure the timely filing of their legal papers with the court. *Noble v. Kelly*, 246 F.3d 93, 97 (2d Cir.2001) (citations omitted). Given the difficulty in determining when a prisoner relinquishes control of the complaint to prison personnel, the date the plaintiff signed the original complaint is presumed to be the date plaintiff gave the complaint to prison officials to be mailed. *See e.g., Forster v. Bigger*, 2003 WL 22299326, *2 (S.D.N.Y. Oct.7, 2003); *Hosendove v. Myers*, 2003 WL 22216809, *2 (D.Conn. Sept.19, 2003); *Hayes v. N.Y.S. D.O.C. Officers*, 1998 WL 901730, *3 (S.D.N.Y. Dec.28, 1998); *Torres v. Irvin*, 33 F.Supp.2d 257, 270 (S.D.N.Y.1998) (cases cited therein).

*4 In response to the Report and Recommendation, plaintiff asserts that, in April, the original complaint "was placed in the facility mail box." (Pl.'s Objection to Report at 1). However, it is uncontested that plaintiff's wife signed the complaint on May 8th; it was received by the Pro Se Office on May 10th; and plaintiff's signature is dated May 13th. There is no explanation offered that could reasonably support and account for the existence of these May dates on a complaint which plaintiff falsely claims to have deposited to be mailed during the period of April 10th and April 12th. Had plaintiff mailed the complaint directly to the court prior to April 26th, it would have been impossible for the plaintiff's wife to have signed the document two

Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.)
(Cite as: 2004 WL 324898 (S.D.N.Y.))

days prior to the date that the Pro Se Office stamped it received on May 10th.^{FN9} Moreover, absent evidence to the contrary, applying the mailbox rule would presume that plaintiff gave his complaint to prison officials on May 13, 1996, the date he signed it. See, [Johnson v. Coombe](#), 156 F.Supp.2d 273, 277 (S.D.N.Y.2001) (quoting [Torres](#), 33 F.Supp.2d at 270). Even if the Court gave plaintiff the benefit of the date plaintiff's wife signed the complaint, i.e., the earliest date reflected on the filed complaint, it was still after the effective date of the PLRA. Hence, plaintiff is legally obligated to have pursued his prison grievance procedures prior to filing the instant action. The plaintiff has offered no explanation for the initial complaint's reference to events that occurred after the date he claims he filed it, the two May dates on which he and his former co-plaintiff wife signed the complaint, or the May date stamped received by the Pro Se Office. As the magistrate Judge observed:

^{FN9}. The benefit of the mailbox rule does not apply where the plaintiff delivers the complaint to someone outside the prison system to forward to the court. [Knickerbocker v. Artuz](#), 271 F.3d 35, 37 (2d Cir.2001).

Apart from the allegation that certain events giving rise to the claims occurred on April 9, 1996, the Original Complaint contains no mention of dates in April, 1996. Mingues nowhere explains the contradiction between the signature dates on the Original Complaint and the allegations contained in Amended Complaint. (Report at 12).

New York state law provides a three tier grievance procedure applicable to plaintiff's claims of excessive force. See, [N.Y. Correct. Law § 139](#) (McKinney's 2003); [N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7 \(2003\)](#); [Mendez v. Goord](#), 2002 WL 31654855 (S.D.N.Y. Nov.21, 2002); [Rodriguez v. Hahn](#), 209 F.Supp.2d 344 (S.D.N.Y.2002). Plaintiff has not denied knowledge of the grievance procedure at his institution, nor claimed that anything or anyone caused him not to file a grievance and completely pursue it through the administrative process.^{FN10} The magistrate judge's determination that the defendants' [Rule 12\(b\)](#) motion should be denied because of an "absence of a clear record" contrary to plaintiff's express allegation in the amended complaint that he

commenced the action before April 26, 1996 is erroneous. The Court could have *sua sponte* dismiss this action as the record is unmistakably clear that an appropriate administrative procedure was available to him, that he was required to exhaust his administrative remedies, and that he failed to do so as required by the PLRA. See, [Mojias v. Johnson](#), 351 F.3d 606 (2003); [Snider v. Melindez](#), 199 F.3d 108, 112-13 (2d Cir.1999). In this case, plaintiff has been afforded notice and given an opportunity to respond to the exhaustion issue and his failure remains clear.

^{FN10}. In the original complaint, plaintiff stated he did not file a grievance, pursuant to the state's prisoner grievance procedure, "because this matter can not be dealt with by interdepartmental grievances." (Compl. at 2-3). In plaintiff's attorney's memorandum in opposition to the motion to dismiss, counsel contends that plaintiff is not required to file a grievance because the state's prison system provides extremely limited administrative remedies and money damages, which plaintiff seeks, are not available.

*5 Accordingly, it is hereby

ORDERED that the Report and Recommendation is not adopted; and it is further

ORDERED that the defendants' motion to dismiss the complaint is granted.

S.D.N.Y.,2004.

Mingues v. Nelson

Not Reported in F.Supp.2d, 2004 WL 324898 (S.D.N.Y.)

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(Cite as: 2008 WL 2522324 (N.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court,

N.D. New York.

James MURRAY, Plaintiff,

v.

R. PALMER, Corrections Officer, Great Meadow Correctional Facility; S. Griffin, Corrections Officer, Great Meadow Correctional Facility; M. Terry, Corrections Officer, Great Meadow Correctional Facility; F. Englese, Corrections Officer, Great Meadow Correctional Facility; Sergeant Edwards, Great Meadow Correctional Facility; K. Bump, Sergeant, Great Meadow Correctional Facility; K.H. Smith, Sergeant, Great Meadow Correctional Facility; A. Paolano, Facility Health Director; and Ted Nesmith, Physicians Assistant, Defendants.

No. 9:03-CV-1010 (DNH/GLS).

June 20, 2008.

James Murray, Malone, NY, pro se.

Hon. [Andrew M. Cuomo](#), Attorney General of the State of New York, [James Seaman, Esq.](#), Asst. Attorney General, of Counsel, Albany, NY, for Defendants.

ORDER

[DAVID N. HURD](#), District Judge.

*1 Plaintiff, James Murray, brought this civil rights action pursuant to [42 U.S.C. § 1983](#). In a 51 page Report Recommendation dated February 11, 2008, the Honorable George H. Lowe, United States Magistrate Judge, recommended that defendants' motion for summary judgment be granted in part (i.e., to the extent that it requests the dismissal with prejudice of plaintiff's claims against defendant Paolano and Nesmith); and denied in part (i.e., to the extent that it requests dismissal of plaintiff's claims against the remaining defendants on the grounds of plaintiff's failure to exhaust available administrative remedies) for the reasons stated in the

Report Recommendation. Lengthy objections to the Report Recommendation have been filed by the plaintiff.

Based upon a de novo review of the portions of the Report-Recommendation to which the plaintiff has objected, the Report-Recommendation is accepted and adopted. See [28 U.S.C. 636\(b\)\(1\)](#).

Accordingly, it is

ORDERED that

1. Defendants' motion for summary judgment is GRANTED in part and DENIED in part;

2. Plaintiff's complaint against defendants Paolano and Nesmith is DISMISSED with prejudice;

3. Defendants' motion for summary judgment is DENIED, to the extent that their request for dismissal of plaintiff's assault claims under the Eighth Amendment against the remaining defendants on the grounds of plaintiff's failure to exhaust available administrative remedies as stated in the Report-Recommendation.

IT IS SO ORDERED.

JAMES MURRAY, Plaintiff,

-v.-

R. PALMER, Corrections Officer, Great Meadow C.F.; S. GRIFFIN, Corrections Officer, Great Meadow C.F.; M. TERRY, Corrections Officer, Great Meadow C.F.; F. ENGLESE, Corrections Officer, Great Meadow C.F.; P. EDWARDS, Sergeant, Great Meadow C.F.; K. BUMP, Sergeant, Great Meadow C.F.; K.H. SMITH, Sergeant, Great Meadow C.F.; A. PAOLANO, Health Director, Great Meadows C.F.; TED NESMITH, Physicians Assistant, Great Meadows C.F., Defendants.

R. PALMER, Corrections Officer, Great Meadow C.F.; S. GRIFFIN, Corrections Officer, Great Meadow C.F.; M. TERRY, Corrections Officer, Great Meadow

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

C.F.; Counter Claimants,

-v.-

JAMES MURRAY, Counter Defendant.

ORDER and REPORT-RECOMMENDATION

[GEORGE H. LOWE](#), United States Magistrate Judge.

This *pro se* prisoner civil rights action, commenced pursuant to [42 U.S.C. § 1983](#), has been referred to me for Report and Recommendation by the Honorable David N. Hurd, United States District Judge, pursuant to [28 U.S.C. § 636\(b\)](#) and Local Rule 72.3(c). Currently pending before the Court is Defendants' motion for summary judgment. (Dkt. No. 78.) For the reasons that follow, I recommend that Defendants' motion be granted in part and denied in part.

I. BACKGROUND

A. Plaintiff's Second Amended Complaint

In his Second Amended Complaint, James Murray ("Plaintiff") alleges that nine correctional officials and health care providers employed by the New York State Department of Correctional Services ("DOCS") at Great Meadow Correctional Facility ("Great Meadow C.F.") violated his rights under the Eighth Amendment on August 17, 2000, when (1) Defendants Palmers, Griffin, Terry, and Englese assaulted him without provocation while he was incapacitated by mechanical restraints, (2) Defendants Edwards, Bump, and Smith witnessed, but did not stop, the assault, and (3) Defendants Paolano and Nesmith failed to examine and treat him following the assault despite his complaints of having a broken wrist. (Dkt. No. 10, ¶¶ 6-7 [Plf.'s Second Am. Compl].)

B. Defendants' Counterclaim

*2 In their Answer to Plaintiff's Second Amended Complaint, three of the nine Defendants (Palmer, Griffin and Terry) assert a counterclaim against Defendant for personal injuries they sustained as a result of Plaintiff's assault and battery upon them during the physical struggle that ensued between them and Plaintiff due to his threatening and violent behavior on August 17, 2000, at Great Meadow C.F. (Dkt. No. 35, Part 1, ¶¶ 23-30 [Defs.' Answer & Counterclaim].)

Answer & Counterclaim].)

I note that the docket in this action inaccurately indicates that this Counterclaim is asserted also on behalf of Defendants Englese, Edwards, Bump, Smith, Paolano, and "Nejwith" (later identified as "Nesmith"). (See Caption of Docket Sheet.) As a result, at the end of this Report-Recommendation, I direct the Clerk's Office to correct the docket sheet to remove the names of those individuals as "counter claimants" on the docket.

I note also that, while such counterclaims are unusual in prisoner civil rights cases (due to the fact that prisoners are often "judgment proof" since they are without funds), Plaintiff paid the \$150 filing fee in this action (Dkt. No. 1), and, in his Second Amended Complaint, he alleges that he received a settlement payment in another prisoner civil rights actions in 2002. (Dkt. No. 10, ¶ 10 [Plf.'s Second Am. Compl.].) Further investigation reveals that the settlement resulted in a payment of \$20,000 to Plaintiff. See *Murray v. Westchester County Jail*, 98-CV-0959 (S.D.N.Y.) (settled for \$20,000 in 2002).

II. DEFENDANTS' MOTION AND PLAINTIFF'S RESPONSE

A. Defendants' Motion

In their motion for summary judgment, Defendants argue that Plaintiff's Second Amended Complaint should be dismissed for four reasons: (1) Plaintiff has failed to adduce any evidence establishing that Defendant Paolano, a supervisor, was personally involved in any of the constitutional violations alleged; (2) Plaintiff has failed to adduce any evidence establishing that Defendant Nesmith was deliberately indifferent to any of Plaintiff's serious medical needs; (3) at the very least, Defendant Nesmith is protected from liability by the doctrine of qualified immunity, as a matter of law; and (4) Plaintiff has failed to adduce any evidence establishing that he exhausted his available administrative remedies with respect to his assault claim, before filing that claim in federal court. (Dkt. No. 78, Part 13, at 2, 4-13 [Defs.' Mem. of Law].)

In addition, Defendants argue that, during his deposition in this action, Plaintiff asserted, for the first time, a claim that the medical staff at Great Meadow C.F. violated his rights under the Eighth Amendment by failing

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

to honor non-life-sustaining medical prescriptions written at a former facility. (*Id.* at 3.) As a threshold matter, Defendants argue, this claim should be dismissed since Plaintiff never included the claim in his Second Amended Complaint, nor did Plaintiff ever file a motion for leave to file a Third Amended Complaint. (*Id.*) In any event, Defendants argue, even if the Court were to reach the merits of this claim, the Court should dismiss the claim because Plaintiff has failed to allege facts plausibly suggesting, or adduce evidence establishing, that Defendants were personally involved in the creation or implementation of DOCS' prescription-review policy, nor has Plaintiff provided such allegations or evidence indicating the policy is even unconstitutional. (*Id.*)

*3 Defendants' motion is accompanied by a Statement of Material Facts, submitted in accordance with Local Rule 7.1(a)(3) ("Rule 7.1 Statement"). (Dkt. No. 78, Part 12.) Each of the 40 paragraphs contained in Defendants' Rule 7.1 Statement is supported by an accurate citation to the record evidence. (*Id.*) It is worth mentioning that the record evidence consists of (1) the affirmations of Defendants Nesmith and Paolano, and exhibits thereto, (2) the affirmation of the Inmate Grievance Program Director for DOCS, and exhibits thereto, (3) affirmation of the Legal Liaison between Great Meadow C.F. and the New York State Attorney General's Office during the time in question, and exhibits thereto, and (4) a 155-page excerpt from Plaintiff's deposition transcript. (Dkt. No. 78.)

B. Plaintiff's Response

After being specifically notified of the consequences of failing to properly respond to Defendants' motion (*see* Dkt. No. 78, Part 1), and after being granted *three* extensions of the deadline by which to do so (*see* Dkt. Nos. 79, 80, 83), Plaintiff submitted a barrage of documents: (1) 49 pages of exhibits, which are attached to neither an affidavit nor a memorandum of law (Dkt. No. 84); (2) 113 pages of exhibits, attached to a 25-page affidavit (Dkt. No. 85); (3) 21 pages of exhibits, attached to a 12-page supplemental affidavit (Dkt. No. 86); and (4) a 29-page memorandum of law (Dkt. No. 86); and a 13-page supplemental memorandum of law (Dkt. No. 88).

Generally in his Memorandum of Law and Supplemental Memorandum of Law, Plaintiff responds to

the legal arguments advanced by Defendants. (*See* Dkt. No. 86, Plf.'s Memo. of Law [responding to Defs.' exhaustion argument]; Dkt. No. 88, at 7-13 [Plf.'s Supp. Memo. of Law, responding to Defs.' arguments regarding the personal involvement of Defendant Paolano, the lack of evidence supporting a deliberate indifference claim against Defendant Nesmith, the applicability of the qualified immunity defense with regard to Plaintiff's claim against Defendant Nesmith, and the sufficiency and timing of Plaintiff's prescription-review claim against Defendant Paolano].) Those responses are described below in Part IV of this Report-Recommendation.

However, unfortunately, not among the numerous documents that Plaintiff has provided is a *proper* response to Defendants' Rule 7.1 Statement. (*See* Dkt. No. 85, Part 2, at 45-52 [Ex. N to Plf.'s Affid.].) Specifically, Plaintiff's Rule 7.1 Response (which is buried in a pile of exhibits) fails, with very few exceptions, to "set forth ... specific citation[s] to the record," as required by Local Rule 7.1(a)(3). (*Id.*) I note that the notary's "sworn to" stamp at the end of the Rule 7.1. Statement does not transform Plaintiff's Rule 7.1 Response into record evidence so as to render that Response compliant with Local Rule 7.1. First, Local Rule 7.1 expressly states, "The record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to interrogatories, admissions and affidavits." N.D.N.Y. L.R. 7.1(a)(3). In this way, the District's Local Rule, like similar local rules of other districts, contemplates citations to a record that is independent of a Rule 7.1 Response. *See, e.g., Vaden v. GAP, Inc.*, 06-CV-0142, 2007 U.S. Dist. LEXIS 22736, at *3-5, 2007 WL 954256 (M.D.Tenn. March 26, 2007) (finding non-movant's verified response to movant's statement of material facts to be deficient because it did cite to affidavit or declaration, nor did it establish that non-movant had actual knowledge of matters to which he attested); *Waterhouse v. District of Columbia*, 124 F.Supp.2d 1, 4-5 (D.D.C.2000) (criticizing party's "Verified Statement of Material Facts," as being deficient in citations to independent record evidence, lacking "firsthand knowledge," and being purely "self-serving" in nature). Moreover, many of Plaintiff's statements in his Rule 7.1 Response are either argumentative in nature or lacking in specificity and personal knowledge, so as to disqualify those statements from having the effect of

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

sworn testimony for purposes of a summary judgment motion. *See, infra*, notes 10-12 of this Report-Recommendation.

III. GOVERNING LEGAL STANDARD

*4 Under [Fed.R.Civ.P. 56](#), summary judgment is warranted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” [Fed.R.Civ.P. 56\(c\)](#). In determining whether a genuine issue of material fact exists,^{FN1} the Court must resolve all ambiguities and draw all reasonable inferences against the moving party.^{FN2}

[FN1.](#) A fact is “material” only if it would have some effect on the outcome of the suit. [Anderson v. Liberty Lobby](#), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[FN2.](#) [Schwapp v. Town of Avon](#), 118 F.3d 106, 110 (2d Cir.1997) [citation omitted]; [Thompson v. Gjivoje](#), 896 F.2d 716, 720 (2d Cir.1990) [citation omitted].

However, when the moving party has met its initial burden of establishing the absence of any genuine issue of material fact, the nonmoving party must come forward with “specific facts showing that there is a genuine issue for trial.” ^{FN3} The nonmoving party must do more than “rest upon the mere allegations ... of the [plaintiffs] pleading” or “simply show that there is some metaphysical doubt as to the material facts.” ^{FN4} Rather, “[a] dispute regarding a material fact is *genuine* if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” ^{FN5}

[FN3.](#) [Fed.R.Civ.P. 56\(e\)](#) (“When a motion for summary judgment is made [by a defendant] and supported as provided in this rule, the [plaintiff] may not rest upon the mere allegations ... of the [plaintiffs] pleading, but the [plaintiffs] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the [plaintiff] does not so respond, summary

judgment, if appropriate, shall be entered against the [plaintiff].”); *see also* [Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.](#), 475 U.S. 574, 585-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

[FN4.](#) [Fed.R.Civ.P. 56\(e\)](#) (“When a motion for summary judgment is made [by a defendant] and supported as provided in this rule, the [plaintiff] may not rest upon the mere allegations ... of the [plaintiffs] pleading”); [Matsushita](#), 475 U.S. at 585-86; *see also* [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[FN5.](#) [Ross v. McGinnis](#), 00-CV-0275, 2004 WL 1125177, at *8 (W.D.N.Y. Mar.29, 2004) [internal quotations omitted] [emphasis added].

What this burden-shifting standard means when a plaintiff has failed to *properly* respond to a defendant's Rule 7.1 Statement of Material Facts is that the facts as set forth in that Rule 7.1 Statement will be accepted as true ^{FN6} to the extent that (1) those facts are supported by the evidence in the record,^{FN7} and (2) the non-moving party, if he is proceeding *pro se*, has been specifically advised of the potential consequences of failing to respond to the movant's motion for summary judgment.^{FN8}

[FN6.](#) *See* N.D.N.Y. L.R. 7.1(a)(3) (“*Any facts set forth in the Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party.*”) [emphasis in original].

[FN7.](#) *See* [Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.](#), 373 F.3d 241, 243 (2d Cir.2004) (“[I]n determining whether the moving party has met [its] burden of showing the absence of a genuine issue for trial, the district court may not rely solely on the statement of undisputed facts contained in the moving party's Rule 56.1 Statement. It must be satisfied that the citation to evidence in the record supports the assertion.”) [internal quotation marks and citations omitted].

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

FN8. See *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir.1996); cf. N.D.N.Y. L.R. 56.2 (imposing on movant duty to provide such notice to *pro se* opponent).

Implied in the above-stated standard is the fact that a district court has no duty to perform an *independent* review of the record to find proof of a factual dispute, even if the non-movant is proceeding *pro se*.^{FN9} In the event the district court chooses to conduct such an independent review of the record, any affidavit submitted by the non-movant, in order to be sufficient to create a factual issue for purposes of a summary judgment motion, must, among other things, not be conclusory.^{FN10} (An affidavit is conclusory if, for example, its assertions lack any supporting evidence or are too general.)^{FN11} Finally, even where an affidavit is nonconclusory, it may be insufficient to create a factual issue where it is (1) “largely unsubstantiated by any other direct evidence” and (2) “so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint.”^{FN12}

FN9. See *Amnesty Am. v. Town of W. Hartford*, 288 F.3d 467, 470 (2d Cir.2002) (“We agree with those circuits that have held that Fed.R.Civ.P. 56 does not impose an obligation on a district court to perform an independent review of the record to find proof of a factual dispute.”) [citations omitted]; accord, *Lee v. Alfonso*, No. 04-1921, 2004 U.S.App. LEXIS 21432, 2004 WL 2309715 (2d Cir. Oct. 14, 2004), aff’g, 97-CV-1741, 2004 U.S. Dist. LEXIS 20746, at *12-13 (N.D.N.Y. Feb. 10, 2004) (Scullin, J.) (granting motion for summary judgment); *Fox v. Amtrak*, 04-CV-1144, 2006 U.S. Dist. LEXIS 9147, at *1-4, 2006 WL 395269 (N.D.N.Y. Feb. 16, 2006) (McAvoy, J.) (granting motion for summary judgment); *Govan v. Campbell*, 289 F.Supp.2d 289, 295 (N.D.N.Y. Oct.29, 2003) (Sharpe, M.J.) (granting motion for summary judgment); *Prestopnik v. Whelan*, 253 F.Supp.2d 369, 371-372 (N.D.N.Y.2003) (Hurd, J.).

FN10. See *Fed.R.Civ.P. 56(e)* (requiring that non-movant “set forth specific facts showing that there is a genuine issue for trial”); *Patterson*, 375 F.3d at 219 (2d. Cir.2004) (“Nor is a genuine issue created merely by the presentation of assertions [in an affidavit] that are conclusory.”) [citations omitted]; *Applegate v. Top Assoc.*, 425 F.2d 92, 97 (2d Cir.1970) (stating that the purpose of Rule 56[e] is to “prevent the exchange of affidavits on a motion for summary judgment from degenerating into mere elaboration of conclusory pleadings”).

FN11. See, e.g., *Bickerstaff v. Vassar Oil*, 196 F.3d 435, 452 (2d Cir.1998) (McAvoy, C.J., sitting by designation) (“Statements [for example, those made in affidavits, deposition testimony or trial testimony] that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.”) [citations omitted]; *West-Fair Elec. Contractors v. Aetna Cas. & Sur.*, 78 F.3d 61, 63 (2d Cir.1996) (rejecting affidavit’s conclusory statements that, in essence, asserted merely that there was a dispute between the parties over the amount owed to the plaintiff under a contract); *Meiri v. Dacon*, 759 F.2d 989, 997 (2d Cir.1985) (plaintiff’s allegation that she “heard disparaging remarks about Jews, but, of course, don’t ask me to pinpoint people, times or places.... It’s all around us” was conclusory and thus insufficient to satisfy the requirements of Rule 56[e]); *Applegate*, 425 F.2d at 97 (“[Plaintiff] has provided the court [through his affidavit] with the characters and plot line for a novel of intrigue rather than the concrete particulars which would entitle him to a trial.”).

FN12. See, e.g., *Jeffreys v. City of New York*, 426 F.3d 549, 554-55 (2d Cir.2005) (affirming grant of summary judgment to defendants in part because plaintiff’s testimony about an alleged assault by police officers was “largely unsubstantiated by any other direct evidence” and was “so replete with inconsistencies and

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint”) [citations and internal quotations omitted]; [Argus, Inc. v. Eastman Kodak Co.](#), 801 F.2d 38, 45 (2d Cir.1986) (affirming grant of summary judgment to defendants in part because plaintiffs’ deposition testimony regarding an alleged defect in a camera product line was, although specific, “unsupported by documentary or other concrete evidence” and thus “simply not enough to create a genuine issue of fact in light of the evidence to the contrary”); [Allah v. Greiner](#), 03-CV-3789, 2006 WL 357824, at *3-4 & n. 7, 14, 16, 21 (S.D.N.Y. Feb.15, 2006) (prisoner’s verified complaint, which recounted specific statements by defendants that they were violating his rights, was conclusory and discredited by the evidence, and therefore insufficient to create issue of fact with regard to all but one of prisoner’s claims, although verified complaint was sufficient to create issue of fact with regard to prisoner’s claim of retaliation against one defendant because retaliatory act occurred on same day as plaintiff’s grievance against that defendant, whose testimony was internally inconsistent and in conflict with other evidence); [Olle v. Columbia Univ.](#), 332 F.Supp.2d 599, 612 (S.D.N.Y.2004) (plaintiff’s deposition testimony was insufficient evidence to oppose defendants’ motion for summary judgment where that testimony recounted specific allegedly sexist remarks that “were either unsupported by admissible evidence or benign”), *aff’d*, 136 F. App’x 383 (2d Cir.2005) (unreported decision, cited not as precedential authority but merely to show the case’s subsequent history, in accordance with [Second Circuit Local Rule § 0.23](#)).

IV. ANALYSIS

A. Whether Plaintiff Has Adduced Evidence Establishing that Defendant Paolano Was Personally Involved in the Constitutional Violations Alleged

“ [P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of

damages under § 1983.” *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994) (quoting *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 [2d Cir.1991]).^{FN13} In order to prevail on a cause of action under 42 U.S.C. § 1983 against an individual, a plaintiff must show some tangible connection between the alleged unlawful conduct and the defendant.^{FN14} If the defendant is a supervisory official, such as a correctional facility superintendent or a facility health services director, a mere “linkage” to the unlawful conduct through “the prison chain of command” (i.e., under the doctrine of *respondeat superior*) is insufficient to show his or her personal involvement in that unlawful conduct.^{FN15} In other words, supervisory officials may not be held liable merely because they held a position of authority.^{FN16} Rather, supervisory personnel may be considered “personally involved” only if they (1) directly participated in the violation, (2) failed to remedy that violation after learning of it through a report or appeal, (3) created, or allowed to continue, a policy or custom under which the violation occurred, (4) had been grossly negligent in managing subordinates who caused the violation, or (5) exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that the violation was occurring.^{FN17}

FN13. *Accord*, [McKinnon v. Patterson](#), 568 F.2d 930, 934 (2d Cir.1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978); [Gill v. Mooney](#), 824 F.2d 192, 196 (2d Cir.1987).

FN14. [Bass v. Jackson](#), 790 F.2d 260, 263 (2d Cir.1986).

FN15. [Polk County v. Dodson](#), 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981); [Richardson v. Goord](#), 347 F.3d 431, 435 (2d Cir.2003); [Wright](#), 21 F.3d at 501; [Ayers v. Coughlin](#), 780 F.2d 205, 210 (2d Cir.1985).

FN16. [Black v. Coughlin](#), 76 F.3d 72, 74 (2d Cir.1996).

FN17. [Colon v. Coughlin](#), 58 F.3d 865, 873 (2d Cir.1995) (adding fifth prong); [Wright](#), 21 F.3d at 501 (adding fifth prong); [Williams v. Smith](#),

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

[781 F.2d 319, 323-324 \(2d Cir.1986\)](#) (setting forth four prongs).

*5 Defendants argue that Plaintiff has not adduced evidence establishing that Defendant Paolano, the Great Meadow C.F. Health Services Director during the time in question, was personally involved in the constitutional violations alleged. (Dkt. No. 78, Part 13, at 2 [Defs.' Memo. of Law].) In support of this argument, Defendants point to the record evidence establishing that, during the time in which Plaintiff was incarcerated at Great Meadow C.F. (i.e., from early August of 2000 to late November of 2000), Defendant Paolano never treated Plaintiff for any medical condition, much less a broken wrist on August 17, 2000. (*Id.*; see also Dkt. No. 78, Part 4, ¶¶ 7-8 [Paolano Affid.]; Dkt. No. 78, Part 5 [Ex. A to Paolano Affid.]; Dkt. No. 78, Part 11, at 32-33 [Plf.'s Depo.].)

Plaintiff responds that (1) Defendant Paolano was personally involved since he “treated” Plaintiff on August 17, 2000, by virtue of his supervisory position as the Great Meadow C.F.'s Health Services Director, and (2) Defendant Paolano has the “final say” regarding what medications inmates shall be permitted to retain when they transfer into Great Meadow C.F. (Dkt. No. 88, at 7-8 [Plf.'s Supp. Memo. of Law].) In support of this argument, Plaintiff cites a paragraph of his Supplemental Affidavit, and an administrative decision, for the proposition that Defendant Paolano, as the Great Meadow C.F. Health Services Director, had the “sole responsibility for providing treatment to the inmates under [the Facility's] care.” (*Id.*; see also Dkt. No. 86, Suppl. Affid., ¶ 5 & Ex. 14.)

1. Whether Defendant Paolano Was Personally Involved in Plaintiff's Treatment on August 17, 2000

With respect to Plaintiff's first point (regarding Defendant Paolano's asserted “treatment” of Plaintiff on August 17, 2000), the problem with Plaintiff's argument is that the uncontroverted record evidence establishes that, as Defendants' assert, Defendant Paolano did not, in fact, treat Plaintiff on August 17, 2000 (or at any time when Plaintiff was incarcerated at Great Meadow C.F.). This was the fact asserted by Defendants in Paragraphs 38 of their Rule 7.1 Statement. (See Dkt. No. 78, Part 12, ¶ 38 [Defs.' Rule 7.1 Statement].) Defendants supported this

factual assertion with record evidence. (*Id.* [providing accurate record citations]; see also Dkt. No. 78, Part 12, ¶¶ 37-38 [Defs.' Rule 7.1 Statement, indicating that it was Defendant Nesmith, not Defendant Paolano, who treated Plaintiff on 8/17/00].) Plaintiff has failed to specifically controvert this factual assertion, despite having been given an adequate opportunity to conduct discovery, and having been specifically notified of the consequences of failing to properly respond to Defendants' motion (see Dkt. No. 78, Part 1), and having been granted *three* extensions of the deadline by which to do so (see Dkt. Nos. 79, 80, 83). Specifically, Plaintiff fails to cite any record evidence in support of his denial of Defendants' referenced factual assertion. (See Dkt. No. 85, Part 2, at 50 [Ex. N to Plf.'s Affid.].) As a result, under the Local Rules of Practice for this Court, Plaintiff has effectively “admitted” Defendants' referenced factual assertions. N.D.N.Y. L.R. 7.1(a)(3).

*6 The Court has no duty to perform an independent review of the record to find proof disputing this established fact. See, *supra*, Part III and note 9 of this Report-Recommendation. Moreover, I decline to exercise my discretion, and I recommend that the Court decline to exercise its discretion, to perform an independent review of the record to find such proof for several reasons, any one of which is sufficient reason to make such a decision: (1) as an exercise of discretion, in order to preserve judicial resources in light of the Court's heavy caseload; (2) the fact that Plaintiff has already been afforded considerable leniency in this action, including numerous deadline extensions and liberal constructions; and (3) the fact that Plaintiff is fully knowledgeable about the requirements of a non-movant on a summary judgment motion, due to Defendants' notification of those requirements, and due to Plaintiff's extraordinary litigation experience.

With regard to this last reason, I note that federal courts normally treat the papers filed by *pro se* civil rights litigants with special solicitude. This is because, generally, *pro se* litigants are unfamiliar with legal terminology and the litigation process, and because the civil rights claims they assert are of a very serious nature. However, “[t]here are circumstances where an overly litigious inmate, who is quite familiar with the legal system and with pleading requirements, may not be afforded [the] special solicitude” that is normally afforded *pro se* litigants.^{FN18} Generally, the

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

rationale for diminishing special solicitude (at least in the Second Circuit) is that the *pro se* litigant's extreme litigiousness demonstrates his *experience*, the lack of which is the reason for extending special solicitude to a *pro se* litigant in the first place.^{FN19} The Second Circuit has diminished this special solicitude, and/or indicated the acceptability of such a diminishment, on several occasions.^{FN20} Similarly, I decide to do so, here, and I recommend the Court do the same.

^{FN18.} *Koehl v. Greene*, 06-CV-0478, 2007 WL 2846905, at *3 & n. 17 (N.D.N.Y. Sept.26, 2007) (Kahn, J., adopting Report-Recommendation) [citations omitted].

^{FN19.} *Koehl*, 2007 WL 2846905, at *3 & n. 18 [citations omitted].

^{FN20.} See, e.g., *Johnson v. Eggersdorf*, 8 F. App'x 140, 143 (2d Cir.2001) (unpublished opinion), *aff'g*, 97-CV-0938, Decision and Order (N.D.N.Y. filed May 28, 1999) (Kahn, J.), *adopting*, Report-Recommendation, at 1, n. 1 (N.D.N.Y. filed Apr. 28, 1999) (Smith, M.J.); *Johnson v. C. Gummerson*, 201 F.3d 431, at *2 (2d Cir.1999) (unpublished opinion), *aff'g*, 97-CV-1727, Decision and Order (N.D.N.Y. filed June 11, 1999) (McAvoy, J.), *adopting*, Report-Recommendation (N.D.N.Y. filed April 28, 1999) (Smith, M.J.); *Davidson v. Flynn*, 32 F.3d 27, 31 (2d Cir.1994); see also *Raitport v. Chem. Bank*, 74 F.R.D. 128, 133 (S.D.N.Y.1977) [citing *Ackert v. Bryan*, No. 27240 (2d Cir. June 21, 1963) (Kaufman, J., concurring)].

Plaintiff is no stranger to the court system. A review of the Federal Judiciary's Public Access to Court Electronic Records ("PACER") System reveals that Plaintiff has filed at least 15 other federal district court actions,^{FN21} and at least three federal court appeals.^{FN22} Furthermore, a review of the New York State Unified Court System's website reveals that he has filed at least 20 state court actions,^{FN23} and at least two state court appeals.^{FN24} Among these many actions he has had at least one victory, resulting in the payment of \$20,000 to him in

settlement proceeds.^{FN25}

^{FN21.} See *Murray v. New York*, 96-CV-3413 (S.D.N.Y.); *Murray v. Westchester County Jail*, 98-CV-0959 (S.D.N.Y.); *Murray v. McGinnis*, 99-CV-1908 (W.D.N.Y.); *Murray v. McGinnis*, 99-CV-2945 (S.D.N.Y.); *Murray v. McGinnis*, 00-CV-3510 (S.D.N.Y.); *Murray v. Jacobs*, 04-CV-6231 (W.D.N.Y.); *Murray v. Bushey*, 04-CV-0805 (N.D.N.Y.); *Murray v. Goord*, 05-CV-1113 (N.D.N.Y.); *Murray v. Wissman*, 05-CV-1186 (N.D.N.Y.); *Murray v. Goord*, 05-CV-1579 (N.D.N.Y.); *Murray v. Doe*, 06-CV-0205 (S.D.N.Y.); *Murray v. O'Herron*, 06-CV-0793 (W.D.N.Y.); *Murray v. Goord*, 06-CV-1445 (N.D.N.Y.); *Murray v. Fisher*, 07-CV-0306 (W.D.N.Y.); *Murray v. Escrow*, 07-CV-0353 (W.D.N.Y.).

^{FN22.} See *Murray v. McGinnis*, No. 01-2533 (2d Cir.); *Murray v. McGinnis*, No. 01-2536 (2d Cir.); *Murray v. McGinnis*, No. 01-2632 (2d Cir.).

^{FN23.} See *Murray v. Goord*, Index No. 011568/1996 (N.Y. Sup.Ct., Westchester County); *Murray v. Goord*, Index No. 002383/1997 (N.Y. Sup.Ct., Chemung County); *Murray v. Goord*, Index No. 002131/1998 (N.Y. Sup.Ct., Chemung County); *Murray v. Goord*, Index No. 002307/1998 (N.Y. Sup.Ct., Chemung County); *Murray v. Goord*, Index No. 002879/1998 (N.Y. Sup.Ct., Chemung County); *Murray v. Goord*, Index No. 002683/2004 (N.Y. Sup.Ct., Chemung County); *Murray v. Goord*, Index No. 002044/2006 (N.Y. Sup.Ct., Chemung County); *Murray v. McGinnis*, Index No. 002099/2006 (N.Y. Sup.Ct., Chemung County); *Murray v. Sullivan*, Index No. 002217/2006 (N.Y. Sup.Ct., Chemung County); *Murray v. Goord*, Index No. 002421/2006 (N.Y. Sup.Ct., Chemung County); *Murray v. Goord*, Index No. 002495/2006 (N.Y. Sup.Ct., Chemung County); *Murray v. Goord*, Index No. 002496/2006 (N.Y. Sup.Ct., Chemung County); *Murray v. Goord*, Index No. 002888/2006 (N.Y. Sup.Ct., Chemung County).

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

County); *Murray v. LeClaire*, Index No. 002008/2007 (N.Y. Sup.Ct., Chemung County); *Murray v. LeClaire*, Index No. 002009/2007 (N.Y. Sup.Ct., Chemung County); *Murray v. LeClaire*, Index No. 002010/2007 (N.Y. Sup.Ct., Chemung County); *Murray v. LeClaire*, Index No. 002011/2007 (N.Y. Sup.Ct., Chemung County); *Murray v. Fisher*, Index No. 002762/2007 (N.Y. Sup.Ct., Chemung County); *Murray v. New York*, Claim No. 108304, Motion No. 67679 (N.Y.Ct.Cl.); *Murray v. New York*, Motion No. M-67997 (N.Y.Ct.Cl.).

[FN24.](#) See *Murray v. Goord*, No. 84875, 709 N.Y.S.2d 662 (N.Y.S.App.Div., 3d Dept.2000); *Murray v. Goord*, No. 83252, 694 N.Y.S.2d 797 (N.Y.S.App.Div., 3d Dept.1999).

[FN25.](#) See *Murray v. Westchester County Jail*, 98-CV-0959 (S.D.N.Y.) (settled for \$20,000 in 2002).

I will add only that, even if I were inclined to conduct such an independent review of the record, the record evidence that Plaintiff cites regarding this issue in his Supplemental Memorandum of Law does not create such a question of fact. (See Dkt. No. 88, at 7-8 [Plf.'s Supp. Memo. of Law, citing Dkt. No. 86, Suppl. Affid., ¶ 5 & Ex. 14].) It appears entirely likely that Defendant Paolano had the ultimate responsibility for providing medical treatment to the inmates at Great Meadow C.F.^{FN26} However, this duty arose solely because of his supervisory position, i.e., as the Facility Health Services Director. It is precisely this sort of supervisory duty that does *not* result in liability under [42 U.S.C. § 1983](#), as explained above.

[FN26.](#) To the extent that Plaintiff relies on this evidence to support the proposition that Defendant Paolano had the “sole” responsibility for such health care, that reliance is misplaced. Setting aside the loose nature of the administrative decision's use of the word “sole,” and the different context in which that word was used (regarding the review of Plaintiff's grievance about having had his prescription

discontinued), the administrative decision's rationale for its decision holds no preclusive effect in this Court. I note that this argument by Plaintiff, which is creative and which implicitly relies on principles of estoppel, demonstrates his facility with the law due to his extraordinary litigation experience.

*7 As for the other ways through which a supervisory official may be deemed “personally involved” in a constitutional violation under [42 U.S.C. § 1983](#), Plaintiff does not even argue (or allege facts plausibly suggesting) [FN27](#) that Defendant Paolano *failed to remedy* the alleged deliberate indifference to Plaintiff's serious medical needs on August 17, 2000, after learning of that deliberate indifference through a report or appeal. Nor does Plaintiff argue (or allege facts plausibly suggesting) that Defendant Paolano created, or allowed to continue, a *policy or custom* under which the alleged deliberate indifference on August 17, 2000, occurred. Nor does Plaintiff argue (or allege facts plausibly suggesting) that Defendant Paolano had been *grossly negligent* in managing subordinates (such as Defendant Nesmith) who caused the alleged deliberate indifference. Nor does Plaintiff argue (or allege facts plausibly suggesting) that Defendant Paolano exhibited *deliberate indifference* to the rights of Plaintiff by failing to act on information indicating that Defendant Nesmith was violating Plaintiff's constitutional rights.

[FN27.](#) See *Bell Atl. Corp. v. Twombly*, --- U.S. ---, ---, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007) (holding that, for a plaintiff's complaint to state a claim upon which relief might be granted under [Fed.R.Civ.P. 8](#) and [12](#), his “[f]actual allegations must be enough to raise a right to relief above the speculative level [to a plausible level],” or, in other words, there must be “plausible grounds to infer [actionable conduct]”), accord, *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir.2007) (“[W]e believe the [Supreme] Court [in *Bell Atlantic Corp. v. Twombly*] is ... requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.”) [emphasis in

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

original].

In the alternative, I reach the same conclusion (that Plaintiff's claim against Defendant Paolano arising from the events of August 17, 2000, lacks merit) on the ground that there was no constitutional violation committed by Defendant Nesmith on August 17, 2000, in which Defendant Paolano could have been personally involved, for the reasons discussed below in Part IV.B. of this Report-Recommendation.

2. Whether Defendant Paolano Was Personally Involved in the Review of Plaintiff's Prescriptions in Early August of 2000

With respect to Plaintiff's second point (regarding Defendant Paolano's asserted "final say" regarding what medications inmates shall be permitted to retain when they transfer into Great Meadow C.F.), there are three problems with this argument.

First, the argument regards a claim that is not properly before this Court for the reasons explained below in Part IV.E. of this Report-Recommendation.

Second, as Defendants argue, even if the Court were to reach the merits of this claim, it should rule that Plaintiff has failed to adduce evidence establishing that Defendant Paolano was personally involved in the creation or implementation of DOCS' prescription-review policy. It is an uncontroverted fact, for purposes of Defendants' motion, that (1) the decision to temporarily deprive Plaintiff of his previously prescribed pain medication (i.e., pending the review of that medication by a physician at Great Meadow C.F.) upon his arrival at Great Meadow C.F. was made by an "intake nurse," not by Defendant Paolano, (2) the nurse's decision was made pursuant to a policy instituted by DOCS, not by Defendant Paolano, and (3) Defendant Paolano did not have the authority to alter that policy. These were the facts asserted by Defendants in Paragraphs 6 through 9 of their Rule 7.1 Statement. (*See* Dkt. No. 78, Part 12, ¶¶ 6-9 [Defs.' Rule 7.1 Statement].) Defendants supported these factual assertions with record evidence. (*Id.* [providing accurate record citations].) Plaintiff expressly admits two of these factual assertions, and fails to support his denial of the remaining factual assertions with citations to record evidence that actually controverts the facts asserted. (Dkt. No. 85, Part 2, at

46-47 [Ex. N to Plf.'s Affid.].)

*8 For example, in support of his denial of Defendants' factual assertion that "[t]his policy is not unique to Great Meadow, but applies to DOCS facilities generally," Plaintiff says that, at an unidentified point in time, "Downstate CF honored doctors proscribed [sic] treatment and filled by prescriptions from Southport Correctional Facility Also I've been transferred to other prisons such as Auburn [C.F.] in which they honored doctors prescribe[d] orders." (*Id.*) I will set aside the fact that Defendants' factual assertion is not that the policy applies to every single DOCS facility but that it applies to them as a general matter. I will also set aside the fact that Plaintiff's assertion is not supported by a citation to independent record evidence. The main problem with this assertion is that it is not specific as to what year or years he had these experiences, nor does it even say that his prescriptions were immediately honored without a review by a physician at the new facility.

The other piece of "evidence" Plaintiff cites in support of this denial is "Superintendent George B. Duncan's 9/22/00 decision of Appeal to him regarding [Plaintiff's Grievance No.] GM-30651-00." (*Id.*) The problem is that the referenced determination states merely that Defendant Paolano, as the Great Meadow C.F. Health Services Director, had the "sole responsibility for providing treatment to the inmates under [the Facility's] care, and has the final say regarding all medical prescriptions." (Dkt. No. 86, at 14 [Ex. 14 to Plf.'s Suppl. Affid.].) For the sake of much-needed brevity, I will set aside the issue of whether an IGP Program Director's broadly stated *rationale* for an appellate determination with respect to a prisoner's grievance can ever constitute evidence sufficient to create proof of a genuine issue of fact for purposes of a summary judgment motion. The main problem with this "evidence" is that there is absolutely nothing inconsistent between (1) a DOCS policy to temporarily deprive prisoners of non-life-sustaining prescription medications upon their arrival at a correctional facility, pending the review of those medical prescriptions by a physician at the facility, and (2) a DOCS policy to give Facility Health Service Directors the "final say" regarding the review of those medical prescriptions.

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

Because Plaintiff has failed to support his denial of these factual assertions with citations to record evidence that actually controverts the facts asserted, I will consider the facts asserted by Defendants as true. N.D.N.Y. L.R. 7.1(a)(3). Under the circumstances, I decline, and I recommend the Court decline, to perform an independent review of the record to find proof disputing this established fact for the several reasons described above in Part IV.A.1. of this Report-Recommendation.

Third, Plaintiff has failed to adduce evidence establishing that the policy in question is even unconstitutional. I note that, in his Supplemental Memorandum of Law, Plaintiff argues that “deliberate indifference to serious medical needs is ... shown by the fact that prisoners are denied access to a doctor and physical examination upon arrival at [Great Meadow] C.F. to determine the need for pain medications which aren't life sustaining” (Dkt. No. 88, at 10 [Plf.'s Supp. Memo. of Law].) As a threshold matter, Plaintiff's argument is misplaced to the extent he is arguing about the medical care other prisoners may not have received upon their arrival at Great Meadow C.F. since this is not a class-action. More importantly, to the extent he is arguing about any medical care that he (allegedly) did not receive upon his arrival at Great Meadow C.F., he cites no record evidence in support of such an assertion. (*Id.*) Indeed, he does not even cite any record evidence establishing that, upon his arrival at Great Meadow C.F. in early 2000, either (1) he asked a Defendant in this action for such medical care, or (2) he was suffering from a serious medical need for purposes of the Eighth Amendment. (*Id.*)

*9 If Plaintiff is complaining that Defendant Paolano is liable for recklessly causing a physician at Great Meadow C.F. to excessively delay a review Plaintiff's pain medication upon his arrival at Great Meadow C.F., then Plaintiff should have asserted that allegation (and some basic facts supporting it) in a pleading in this action so that Defendants could have taken adequate discovery on it, and so that the Court could squarely review the merits of it. (Dkt. No. 78, Part 11, at 53 [Plf.'s Depo].)

For all of these reasons, I recommend that Plaintiff's claims against Defendant Paolano be dismissed with

prejudice.

B. Whether Plaintiff Has Adduced Evidence Establishing that Defendant Nesmith Was Deliberately Indifferent to Plaintiff's Serious Medical Needs

Generally, to state a claim for inadequate medical care, a plaintiff must allege facts plausibly suggesting two things: (1) that he had a sufficiently serious medical need; and (2) that the defendants were deliberately indifferent to that serious medical need. [*Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 \(1976\)](#); [*Chance v. Armstrong*, 143 F.3d 698, 702 \(2d Cir.1998\)](#).

Defendants argue that, even assuming that Plaintiff's broken wrist constituted a sufficiently serious medical condition for purposes of the Eighth Amendment, Plaintiff has not adduced evidence establishing that, on August 17, 2000, Defendant Nesmith acted with deliberate indifference to that medical condition. (Dkt. No. 78, Part 13, at 4-9 [Defs.' Memo. of Law].) In support of this argument, Defendants point to the record evidence establishing that Defendant Nesmith sutured lacerations in Plaintiff's forehead, ordered an x-ray examination of Plaintiff's wrist, and placed that wrist in a splint (with an intention to replace that splint with a cast once the swelling in Plaintiff's wrist subsided) within 24 hours of the onset of Plaintiff's injuries. (*Id.* at 7-9 [providing accurate record citations].) Moreover, argue Defendants, Plaintiff's medical records indicate that he did not first complain of an [injury to his wrist](#) until hours after he experienced that injury. (*Id.* at 8 [providing accurate record citation].)

Plaintiff responds that “[he] informed P.A. Nesmith that his wrist felt broken and P.A. Nesmith ignored plaintiff, which isn't reasonable. P.A. Nesmith didn't even care to do a physical examination to begin with[,] which would've revealed [the broken wrist] and is fundamental medical care after physical trauma.” (Dkt. No. 88, at 11 [Plf.'s Supp. Memo. of Law].) In support of this argument, Plaintiff cites *no* record evidence. (*Id.* at 11-12.)

The main problem with Plaintiff's argument is that the uncontroverted record evidence establishes that, as Defendants have argued, Defendant Nesmith (1) sutured lacerations in Plaintiff's forehead within hours if not minutes of Plaintiff's injury and (2) ordered an x-ray

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

examination of Plaintiff's wrist, and placed that wrist in a splint (with an intention to replace that splint with a cast once the swelling in Plaintiff's wrist subsided) within 24 hours of the onset of Plaintiff's injuries. These facts were asserted by Defendants in Paragraphs 27 through 32 of their Rule 7.1 Statement. (See Dkt. No. 78, Part 12, ¶¶ 27-32 [Defs.' Rule 7.1 Statement].) Defendants supported these factual assertions with record evidence. (*Id.* [providing accurate record citations].) Plaintiff expressly admits most of these factual assertions, and fails to support his denial of the remaining factual assertions with citations to record evidence that actually controverts the facts asserted. (Dkt. No. 85, Part 2, at 48-50 [Ex. N to Plf.'s Affid.].)

*10 The only denial he supports with a record citation is with regard to when, within the referenced 24-hour period, Defendant Nesmith ordered his [wrist x-ray](#). This issue is not material, since I have assumed, for purposes of Defendants' motion, merely that Defendant Nesmith ordered Plaintiff's [wrist x-ray](#) within 24 hours of the onset of Plaintiff's injury.^{FN28} (Indeed, whether the [wrist x-ray](#) was ordered in the late evening of August 17, 2000, or the early morning of August 18, 2000, would appear to be immaterial for the additional reason that it would appear unlikely that any x-rays could be conducted in the middle of the night in Great Meadow C.F.)

^{FN28}. Furthermore, I note that the record evidence he references (in support of his argument that the x-ray was on the morning of August 18, 2000, not the evening of August 17, 2000) is "Defendants exhibit 20," which he says "contains [an] 11/20/00 Great Meadow Correctional Facility Investigation Sheet by P. Bundrick, RN, NA, and Interdepartmental Communication from defendant Ted Nesmith P.A. that state [that the] X ray was ordered on 8/18/00 in the morning." (*Id.*) I cannot find, in the record, any "exhibit 20" having been submitted by Defendants, who designated their exhibits by letter, not number. (See generally Dkt. No. 78.) However, at Exhibit G of Defendant Nesmith's affidavit, there is the "Investigation Sheet" to which Plaintiff refers. (Dkt. No. 78, Part 3, at 28 [Ex. G to Nesmith

Affid.].) The problem is that document does not say what Plaintiff says. Rather, it says, "Later that evening [on August 17, 2000] ... [a]n x-ray was ordered for the following morning" (*Id.*) In short, the document says that the x-ray was not ordered *on* the morning of August 18, 2000, but *for* that morning. Granted, the second document to which Plaintiff refers, the "Interdepartmental Communication" from Defendant Nesmith, does say that "I saw him the next morning and ordered an xray" (*Id.* at 29.) I believe that this is a misstatement, given the overwhelming record evidence to the contrary.

Moreover, in confirming the accuracy of Defendants' record citations contained in their Rule 7.1 Statement, I discovered several facts further supporting a finding that Defendant Nesmith's medical care to Plaintiff was both prompt and responsive. In particular, the record evidence cited by Defendants reveals the following specific facts:

(1) at approximately 10:17 a.m. on August 17, 2000, Plaintiff was first seen by someone in the medical unit at Great Meadow C.F. (Nurse Hillary Cooper);

(2) at approximately 10:40 a.m. on August 17, 2000, Defendant Nesmith examined Plaintiff; during that examination, the main focus of Defendant Nesmith's attention was Plaintiff's complaint of the lack of feeling in his lower extremities; Defendant Nesmith responded to this complaint by confirming that Plaintiff could still move his lower extremities, causing Plaintiff to receive an x-ray examination of his spine (which films did not indicate any pathology), and admitting Plaintiff to the prison infirmary for observation;

(3) at approximately 11:00 a.m. on August 17, 2000, Defendant Nesmith placed four sutures in each of two 1/4" lacerations on Plaintiff's left and right forehead;

(4) by 11:20 a.m. Plaintiff was given, or at least prescribed, [Tylenol](#) by a medical care provider;

(5) Plaintiff's medical records reflect no complaint by Plaintiff of any [injury to his wrist](#) at any point in time other than between 4:00 p.m. and midnight on August 17,

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

2000;

(6) at some point after 9:00 p.m. on August 17, 2000, and 9:00 a.m. on the morning of August 18, 2000, Defendant Nesmith ordered that Plaintiff's wrist be examined by x-ray, in response to Plaintiff's complaint of an [injured wrist](#); that x-ray examination occurred at Great Meadow C.F. at some point between 9:00 a.m. on August 17, 2000, and 11:00 a.m. on August 18, 2000, when Defendant Nesmith personally performed a "wet read" of the x-rays before sending them to Albany Medical Center for a formal reading by a radiologist;

(7) at approximately 11:00 a.m. on August 18, 2000, Defendant Nesmith placed a splint on Plaintiff's wrist and forearm with the intent of replacing it with a cast in a couple of days; the reason that Defendant Nesmith did not use a cast at that time was that Plaintiff's wrist and forearm were swollen, and Defendant Nesmith believed, based on 30 years experience treating hundreds of fractures, that it was generally not good medical practice to put a cast on a fresh fracture, because the cast will not fit tightly once the swelling subsides;

*11 (8) on August 22, 2000, Defendant Nesmith replaced the splint with a cast;

(9) on August 23, 2000, Plaintiff was discharged from the infirmary at Great Meadow C.F.; and

(10) on August 30, 2000, Defendant Nesmith removed the sutures from Plaintiff's forehead. (See generally Dkt. No. 78, Part 2, ¶¶ 3-15 [Affid. of Nesmith]; Dkt. No. 78, Part 3, Exs. A-E [Exs. to Affid. of Nesmith].)

"[D]eliberate indifference describes a state of mind more blameworthy than negligence," [FN29](#) one that is "equivalent to criminal recklessness." [FN30](#) There is no evidence of such criminal recklessness on the part of Defendant Nesmith, based on the uncontroverted facts before the Court, which show a rather prompt and responsive level of medical care given by Defendant Nesmith to Plaintiff, during the hours and days following the onset of his injuries.

[FN29, Farmer v. Brennan, 511 U.S. 825, 835,](#)

[114 S.Ct. 1970, 128 L.Ed.2d 811 \(1994\)](#) ("[D]eliberate indifference [for purposes of an Eighth Amendment claim] describes a state of mind more blameworthy than negligence."); [Estelle, 429 U.S. at 106](#) ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); [Murphy v. Grabo, 94-CV-1684, 1998 WL 166840, at *4 \(N.D.N.Y. Apr.9, 1998\)](#) (Pooler, J.) ("Deliberate indifference, whether evidenced by [prison] medical staff or by [prison] officials who allegedly disregard the instructions of [prison] medical staff, requires more than negligence.... Disagreement with prescribed treatment does not rise to the level of a constitutional claim.... Additionally, negligence by physicians, even amounting to malpractice, does not become a constitutional violation merely because the plaintiff is an inmate.... Thus, claims of malpractice or disagreement with treatment are not actionable under [section 1983](#)." [citations omitted].").

[FN30, Hemmings v. Gorczyk, 134 F.3d 104, 108 \(2d Cir.1998\)](#) ("The required state of mind [for a deliberate indifference claim under the Eighth Amendment], equivalent to criminal recklessness, is that the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists; and he must also draw the inference.") [internal quotation marks and citations omitted]; [Hathaway v. Coughlin, 99 F.3d 550, 553 \(2d Cir.1996\)](#) ("The subjective element requires a state of mind that is the equivalent of criminal recklessness") [citation omitted]; cf. [Farmer, 511 U.S. at 827](#) ("[S]ubjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment.").

In his argument that his treatment in question constituted deliberate indifference to a serious medical need, Plaintiff focuses on the approximate 24-hour period that appears to have elapsed between the onset of his injury and his receipt of an x-ray examination of his wrist. He argues that this 24-hour period of time constituted a delay that was unreasonable and reckless. In support of his argument, he cites two cases. See *Brown v. Hughes*, 894 F.2d 1533, 1538-39 (11th Cir.), cert. denied, 496 U.S. 928, 110 S.Ct. 2624, 110 L.Ed.2d 645 (1990); *Loe v. Armistead*, 582 F.2d 1291, 1296 (4th Cir.1978), cert. denied, 446 U.S. 928, 100 S.Ct. 1865, 64 L.Ed.2d 281 (1980). However, the facts of both cases are clearly distinguishable from the facts of the case at hand.

In *Brown v. Hughes*, the Eleventh Circuit found a genuine issue of material fact was created as to whether a correctional officer knew of a prisoner's foot injury during the four hours in which no medical care was provided to the prisoner, so as to preclude summary judgment for that officer. *Brown*, 894 F.2d at 1538-39. However, the Eleventh Circuit expressly stated that the question of fact was created because the prisoner had "submitted affidavits stating that [the officer] was called to his cell because there had been a fight, that while [the officer] was present [the prisoner] began to limp and then hop on one leg, that his foot began to swell severely, that he told [the officer] his foot felt as though it were broken, and that [the officer] promised to send someone to look at it but never did." *Id.* Those are *not* the facts of this case.

In *Loe v. Armistead*, the Fourth Circuit found merely that, in light of the extraordinary leniency with which *pro se* complaints are construed, the court was unable to conclude that a prisoner had failed to state a claim upon which relief might be granted for purposes of a motion to dismiss pursuant to [Fed.R.Civ.P. 12\(b\) \(6\)](#) because the prisoner had alleged that the defendants-*despite being (at some point) "notified" of the prisoner's injured arm*-had inexplicably delayed for 22 hours in giving him medical treatment for the injury. *Loe*, 582 F.2d at 1296. More specifically, the court expressly construed the prisoner's

complaint as alleging that, following the onset of the plaintiff's injury at 10:00 a.m. on the day in question, the plaintiff was immediately taken to the prison's infirmary where a nurse, while examining the prisoner's arm, heard him complain to her about pain. *Id.* at 1292. Furthermore, the court construed the prisoner's complaint as alleging that, "[t]hroughout the day, until approximately 6:00 p.m., [the prisoner] repeatedly requested that he be taken to the hospital. He was repeatedly told that only the marshals could take him to a hospital and that they had been notified of his injury." *Id.* at 1292-93. Again, those are *not* the facts of this case.

*12 Specifically, there is no evidence in the record of which I am aware that at any time before 4:00 p.m. on August 17, 2000, Defendant Nesmith either (1) heard Plaintiff utter a complaint about a [wrist injury](#) sufficient to warrant an x-ray examination or (2) observed physical symptoms in Plaintiff's wrist (such as an obvious deformity) that would place him on notice of such an injury. As previously stated, I decline, and I urge the Court to decline, to tediously sift through the 262 pages of documents that Plaintiff has submitted in the hope of finding a shred of evidence sufficient to create a triable issue of fact as to whether Plaintiff made, and Defendant Nesmith heard, such a complaint before 4:00 p.m. on August 17, 2000.

I note that, in reviewing Plaintiff's legal arguments, I have read his testimony on this issue. That testimony is contained at Paragraphs 8 through 12, and Paragraph 18, of his Supplemental Affidavit. (See Dkt. No. 86, at ¶¶ 8-10, 18 [Plf.'s Supp. Affid., containing two sets of Paragraphs numbered "5" through "11"].) In those Paragraphs, Plaintiff swears, in pertinent part, that "[w]hile I was on the x-ray table I told defendant Ted Nesmith, P.A. and/or Bill Redmond RN ... that my wrist felt broken, and was ignored." (*Id.* at ¶ 9.) Plaintiff also swears that "I was [then] put into a room in the facility clinic[,] and I asked defendant Ted Nesmith, PA[,] shortly thereafter for [an] x-ray of [my] wrist[,] pain medication and [an] ice pack but wasn't given it [sic]." (*Id.* at ¶ 10.) Finally, Plaintiff swears as follows: "At one point on 8/17/00 defendant Nesmith told me that he didn't give a damn when I kept complaining that my wrist felt broken and how I'm going to sue him cause I'm not stupid

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

[enough] to not know he's supposed to do [a] physical examination [of me], [and not] to ignore my complaints about [my] wrist feeling broke and feeling extreem [sic] pain. He told me [to] stop complaining [and that] he's done with me for the day." (*Id.* at ¶ 18.)

This last factual assertion is important since a response of "message received" from the defendant appears to have been critical in the two cases cited by Plaintiff. It should be emphasized that, according to the undisputed facts, when Plaintiff made his asserted wrist complaint to Defendant Nesmith during the morning of August 17, 2000, Defendant Nesmith was either suturing up Plaintiff's forehead or focusing on Plaintiff's complaint of a lack of feeling in his lower extremities. (This complaint of lack of feeling, by the way, was found to be inconsistent with Defendant Nesmith's physical examination of Plaintiff.)

In any event, Defendant Nesmith can hardly be said to have, in fact, "ignored" Plaintiff since he placed him under *observation* in the prison's infirmary (and apparently was responsible for the prescription of Tylenol for Plaintiff). ^{FN31} Indeed, it was in the infirmary that Plaintiff was observed by a medical staff member to be complaining about his wrist, which resulted in an x-ray examination of Plaintiff's wrist.

^{FN31}. In support of my conclusion that this fact alone is a sufficient reason to dismiss Plaintiff's claims against Defendant Nesmith, I rely on a case cited by Plaintiff himself. See Brown, 894 F.2d at 1539 ("Although no nurses were present [in the hospital] at the jail that day, the procedure of sending [the plaintiff] to the hospital, once employed, was sufficient to ensure that [the plaintiff's broken] foot was treated promptly. Thus, [the plaintiff] has failed to raise an issue of deliberate indifference on the part of these defendants, and the order of summary judgment in their favor must be affirmed.").

*13 Even if it were true that Plaintiff made a wrist complaint directly to Defendant Nesmith (during Defendant Nesmith's examination and treatment of Plaintiff between 10:40 a.m. and 11:00 a.m. on August 17,

2000), and Defendant Nesmith heard that complaint, and that complaint were specific and credible enough to warrant an immediate x-ray examination, there would be, at most, only some *negligence* by Defendant Nesmith in not ordering an x-ray examination until 9:00 p.m. that night.

As the Supreme Court has observed, "[T]he question of whether an X-ray-or additional diagnostic techniques or forms of treatment-is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice....." Estelle, 429 U.S. at 107.^{FN32} For this reason, this Court has actually held that a 17-day delay between the onset of the prisoner's apparent wrist fracture and the provision of an x-ray examination and cast did not constitute deliberate indifference, as a matter of law. Miles v. County of Broome, 04-CV-1147, 2006 U.S. Dist. LEXIS 15482, at *27-28, 2006 WL 561247 (N.D.N.Y. Mar. 6, 2006) (McAvoy, J.) (granting defendants' motion for summary judgment with regard to prisoner's deliberate indifference claim).

^{FN32}. See also Sonds v. St. Barnabas Hosp. Corr. Health Servs., 151 F.Supp.2d 303, 312 (S.D.N.Y.2001) (prisoner's "disagreements over medications, diagnostic techniques (e.g., the need for X-rays), forms of treatment, or the need for specialists or the timing of their intervention [with regard to the treatment of his broken finger], are not adequate grounds for a section 1983 claim. These issues implicate medical judgments and, at worst, negligence amounting to medical malpractice, but not the Eighth Amendment.") [citation omitted]; cf. O'Bryan v. Federal Bureau of Prisons, 07-CV-0076, 2007 U.S. Dist. LEXIS 65287, at *24-28 (E.D.Ky. Sept. 4, 2007) (holding no deliberate indifference where prisoner wore wrist brace/bandage on his broken wrist for two months even though he had asked for a cast; finding that "the type of wrap would only go the difference of opinion between a patient and doctor about what should be done, and the Supreme Court has stated that a difference of opinion regarding the plaintiff's

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

diagnosis and treatment does not state a constitutional claim.”).

As I read Plaintiff's complaints about the medical care provided to him by Defendant Nesmith in this action, I am reminded of what the Second Circuit once observed:

It must be remembered that the State is not constitutionally obligated, much as it may be desired by inmates, to construct a perfect plan for [medical] care that exceeds what the average reasonable person would expect or avail herself of in life outside the prison walls. [A] correctional facility is not a health spa, but a prison in which convicted felons are incarcerated. Common experience indicates that the great majority of prisoners would not in freedom or on parole enjoy the excellence in [medical] care which plaintiff[] understandably seeks We are governed by the principle that the objective is not to impose upon a state prison a model system of [medical] care beyond average needs but to provide the minimum level of [medical] care required by the Constitution.... The Constitution does not command that inmates be given the kind of medical attention that judges would wish to have for themselves

Dean v. Coughlin, 804 F.2d 207, 215 (2d Cir.1986) [internal quotations and citations omitted].

For all of these reasons, I recommend that Plaintiff's claims against Defendant Nesmith be dismissed with prejudice.

C. Whether Defendant Nesmith Is Protected from Liability by the Doctrine of Qualified Immunity, As a Matter of Law

“Once qualified immunity is pleaded, plaintiff's complaint will be dismissed unless defendant's alleged conduct, when committed, violated ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’ ” ^{FN33} In determining whether a particular right was *clearly established*, courts in this Circuit consider three factors:

^{FN33}. Williams, 781 F.2d at 322 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 815 [1982]).

*14 (1) whether the right in question was defined with ‘reasonable specificity’; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful. ^{FN34}

^{FN34}. Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir.1991) (citations omitted).

Regarding the issue of whether *a reasonable person would have known* he was violating a clearly established right, this “objective reasonableness” ^{FN35} test is met if “officers of reasonable competence could disagree on [the legality of defendant's actions].” ^{FN36} As the Supreme Court explained,

^{FN35}. See Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987) (“[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective reasonableness of the action.’ ”) (quoting Harlow, 457 U.S. at 819); Benitez v. Wolff, 985 F.2d 662, 666 (2d Cir.1993) (qualified immunity protects defendants “even where the rights were clearly established, if it was objectively reasonable for defendants to believe that their acts did not violate those rights”).

^{FN36}. Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); see also Malsh v. Correctional Officer Austin, 901 F.Supp. 757, 764 (S.D.N.Y.1995) (citing cases); Ramirez v. Holmes, 921 F.Supp. 204, 211 (S.D.N.Y.1996).

[T]he qualified immunity defense ... provides ample protection to all but the plainly incompetent or those who knowingly violate the law Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

should be recognized.^{FN37}

^{FN37.} *Malley*, 475 U.S. at 341.

Furthermore, courts in the Second Circuit recognize that “the use of an ‘objective reasonableness’ standard permits qualified immunity claims to be decided as a matter of law.”^{FN38}

^{FN38.} *Malsh*, 901 F.Supp. at 764 (citing *Cartier v. Lussier*, 955 F.2d 841, 844 [2d Cir.1992] [citing Supreme Court cases].)

Here, I agree with Defendants that, based on the current record, it was not clearly established that, between August 17, 2000, and August 22, 2000, Plaintiff possessed an Eighth Amendment right to receive an x-ray examination and casting of his wrist any sooner than he did. (Dkt. No. 78, Part 13, at 9-11 [Defs.’ Memo. of Law].) I note that neither of the two decisions cited by Plaintiff (discussed earlier in this Report-Recommendation) were controlling in the Second Circuit. See *Brown v. Hughes*, 894 F.2d 1533, 1538-39 (11th Cir.), cert. denied, 496 U.S. 928, 110 S.Ct. 2624, 110 L.Ed.2d 645 (1990); *Loe v. Armistead*, 582 F.2d 1291, 1296 (4th Cir.1978), cert. denied, 446 U.S. 928, 100 S.Ct. 1865, 64 L.Ed.2d 281 (1980). I also note that what was controlling was the Supreme Court’s decision in *Estelle v. Gamble*, holding that “the question of whether an X-ray-or additional diagnostic techniques or forms of treatment-is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice.....” *Estelle*, 429 U.S. at 107.

Furthermore, I agree with Defendants that, at the very least, officers of reasonable competence could have believed that Defendant Nesmith’s actions in conducting the x-ray examination and casting when he did were legal.^{FN39} In his memorandum of law, Plaintiff argues that Defendant Nesmith *intentionally* delayed giving Plaintiff an x-ray for 12 hours, and that the four-day delay of placing a hard cast on Plaintiff’s wrist caused Plaintiff *permanent injury to his wrist*. (Dkt. No. 88, at 12-13 [Plf.’s Supp. Memo. of Law].) He cites no portion of the

record for either assertion. (*Id.*) Nor would the fact of permanent injury even be enough to propel Plaintiff’s Eighth Amendment claim to a jury.^{FN40} I emphasize that it is an undisputed fact, for purposes of Defendants’ motion, that the reason that Defendant Nesmith placed a splint and not a cast on Plaintiff’s wrist and arm on the morning of August 18, 2000, was that Plaintiff’s wrist and forearm were swollen, and Defendant Nesmith’s medical judgment (based on his experience) was that it was not good medical practice to put a cast on a fresh fracture, because the cast will not fit tightly once the swelling subsides.^{FN41} Officers of reasonable competence could have believed that decision was legal.

^{FN39.} (*Id.*)

^{FN40.} This particular point of law was recognized in one of the cases Plaintiff himself cites. *Loe*, 582 F.2d at 1296, n. 3 (“[Plaintiff’s] assertion that he suffered pain two and one-half weeks after the injury and that the fracture had not healed do not establish deliberate indifference or lack of due process. Similarly, his allegation that he has not achieved a satisfactory recovery suggests nothing more than possible medical malpractice. It does not assert a constitutional tort.”).

^{FN41.} (Dkt. No. 78, Part 12, ¶¶ 31-33 [Defs.’ Rule 7.1 Statement]; see also Dkt. No. 78, Part 2, ¶¶ 11-13 [Affid. of Nesmith]; Dkt. No. 78, Part 3, Ex. C [Exs. to Affid. of Nesmith])

*15 As a result, I recommend that, in the alternative, the Court dismiss Plaintiff’s claims against Defendant Nesmith based on the doctrine of qualified immunity.

D. Whether Plaintiff Has Adduced Evidence Establishing that He Exhausted His Available Administrative Remedies with Respect to His Assault Claim

The Prison Litigation Reform Act of 1995 (“PLRA”) requires that prisoners who bring suit in federal court must first exhaust their available administrative remedies: “No action shall be brought with respect to prison conditions under § 1983 ... by a prisoner confined in any jail, prison,

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

or other correctional facility until such administrative remedies as are available are exhausted.” ^{FN42} “[T]he PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” ^{FN43} The Department of Correctional Services (“DOCS”) has available a well-established three-step inmate grievance program. ^{FN44}

[FN42. 42 U.S.C. § 1997e.](#)

[FN43. *Porter v. Nussle*, 534 U.S. 516, 532, 122 S.Ct. 983, 152 L.Ed.2d 12 \(2002\).](#)

[FN44. 7 N.Y.C.R.R. § 701.7.](#)

Generally, the DOCS Inmate Grievance Program (“IGP”) involves the following procedure.^{FN45} *First*, an inmate must file a complaint with the facility’s IGP clerk within fourteen (14) calendar days of the alleged occurrence. A representative of the facility’s inmate grievance resolution committee (“IGRC”) has seven working days from receipt of the grievance to informally resolve the issue. If there is no such informal resolution, then the full IGRC conducts a hearing within seven (7) working days of receipt of the grievance, and issues a written decision within two (2) working days of the conclusion of the hearing. *Second*, a grievant may appeal the IGRC decision to the facility’s superintendent within four (4) working days of receipt of the IGRC’s written decision. The superintendent is to issue a written decision within ten (10) working days of receipt of the grievant’s appeal. *Third*, a grievant may appeal to the central office review committee (“CORC”) within four (4) working days of receipt of the superintendent’s written decision. CORC is to render a written decision within twenty (20) working days of receipt of the appeal. It is important to emphasize that *any failure by the IGRC or the superintendent to timely respond to a grievance or first-level appeal, respectively, can be appealed to the next level, including CORC, to complete the grievance process.* ^{FN46}

[FN45. 7 N.Y.C.R.R. § 701.7; see also *White v. The State of New York*, 00-CV-3434, 2002 U.S. Dist. LEXIS 18791, at *6 \(S.D.N.Y. Oct 3, 2002\).](#)

[FN46. 7 N.Y.C.R.R. § 701.6\(g\)](#) (“[M]atters not decided within the time limits may be appealed to the next step.”); [Hemphill v. New York](#), 198 F.Supp.2d 546, 549 (S.D.N.Y.2002), *vacated and remanded on other grounds*, 380 F.3d 680 (2d Cir.2004); *see, e.g.*, [Crosswell v. McCoy](#), 01-CV-0547, 2003 WL 962534, at *4 (N.D.N.Y. March 11, 2003) (Sharpe, M.J.) (“If a plaintiff receives no response to a grievance and then fails to appeal it to the next level, he has failed to exhaust his administrative remedies as required by the PLRA.”); [Reyes v. Punzal](#), 206 F.Supp.2d 431, 433 (W.D.N.Y.2002) (“Even assuming that plaintiff never received a response to his grievance, he had further administrative avenues of relief open to him.”); [Nimmons v. Silver](#), 03-CV-0671, Report-Recommendation, at 15-16 (N.D.N.Y. filed Aug. 29, 2006) (Lowe, M.J.) (recommending that the Court grant Defendants’ motion for summary judgment, in part because plaintiff adduced no evidence that he appealed the lack of a timely decision by the facility’s IGRC to the next level, namely to either the facility’s superintendent or CORC), *adopted by* Decision and Order (N.D.N.Y. filed Oct. 17, 2006) (Hurd, J.).

Generally, if a prisoner has failed to follow each of these steps prior to commencing litigation, he has failed to exhaust his administrative remedies. ^{FN47} However, the Second Circuit has held that a three-part inquiry is appropriate where a defendant contends that a prisoner has failed to exhaust his available administrative remedies, as required by the PLRA.^{FN48} *First*, “the court must ask whether [the] administrative remedies [not pursued by the prisoner] were in fact ‘available’ to the prisoner.” ^{FN49} *Second*, if those remedies were available, “the court should ... inquire as to whether [some or all of] the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it ... or whether the defendants’ own actions inhibiting the [prisoner’s] exhaustion of remedies may estop one or more of the defendants from raising the plaintiff’s failure to exhaust as a defense.” ^{FN50} *Third*, if the remedies were available and some of the defendants did not forfeit, and

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

were not estopped from raising, the non-exhaustion defense, “the Court should consider whether ‘special circumstances’ have been plausibly alleged that justify the prisoner’s failure to comply with the administrative procedural requirements.” [FN51](#)

[FN47. *Rodriguez v. Hahn*, 209 F.Supp.2d 344, 347-48 \(S.D.N.Y.2002\); *Reves v. Punzal*, 206 F.Supp.2d 431, 433 \(W.D.N.Y.2002\).](#)

[FN48. See *Hemphill v. State of New York*, 380 F.3d 680, 686, 691 \(2d Cir.2004\).](#)

[FN49. *Hemphill*, 380 F.3d at 686](#) (citation omitted).

[FN50. *Id.*](#) [citations omitted].

[FN51. *Id.*](#) [citations and internal quotations omitted].

*16 Defendants argue that Plaintiff never exhausted his available administrative remedies with regard to his claim arising out of the assault that allegedly occurred on August 17, 2000. (Dkt. No. 78, Part 13, at 9-11 [Defs.’ Memo. of Law].)

Plaintiff responds with four different legal arguments. First, he appears to argue that he handed a written grievance to an unidentified corrections officer but never got a response from the IGRC, and that filing an appeal under such a circumstance is merely optional, under the PLRA (Dkt. No. 86, at 23-25, 44 [Plf.’s Memo. of Law].) Second, he argues that Defendants “can’t realistically show” that Plaintiff never sent any grievances or appeals to the Great Meadow C.F. Inmate Grievance Clerk since that facility did not (during the time in question) have a grievance “receipt system.” (*Id.* at 25-29.) In support of this argument, he cites unspecified record evidence that, although he sent a letter to one “Sally Reams” at some point and received a letter back from her on May 5, 2003, she later claimed that she had never received a letter from Plaintiff. (*Id.* at 29.) Third, he argues that the determination he received from CORC (at some point) satisfied the PLRA’s exhaustion requirement. (*Id.* at 30-38.) Fourth, he argues that Defendants rendered any

administrative remedies “unavailable” to Plaintiff, for purposes of the Second Circuit’s above-described three-part exhaustion inquiry, by (1) failing to cause DOCS to provide proper “instructional provisions” in its directives, (2) failing to cause Great Meadow C.F. to have a grievance “receipt system,” and (3) “trash [ing]” Plaintiff’s grievances and appeals. (*Id.* at 39-45.) [FN52](#)

[FN52.](#) I note that the breadth of Plaintiff’s creative, thoughtful and well-developed legal arguments further demonstrates his extraordinary experience as a litigant.

For the reasons set forth below, I reject each of these arguments. However, I am unable to conclude, for another reason, that Plaintiff has failed to exhaust his administrative remedies as a matter of law, based on the current record.

1. Plaintiff’s Apparent Argument that an Appeal from His Lost or Ignored Grievance Was “Optional” Under the PLRA

Plaintiff apparently argues that filing an appeal to CORC when one has not received a response to one’s grievance is merely optional under the PLRA. (Dkt. No. 86, at 23-25, 44 [Plf.’s Memo. of Law].) If this is Plaintiff’s argument, it misses the point.

It may be true that the decision of whether or not to file an appeal in an action is always “optional”-from a metaphysical standpoint. However, it is also true that, in order to satisfy the PLRA’s exhaustion requirement, one *must* file an appeal when one has not received a response to one’s grievance (unless one of the exceptions contained in the Second Circuit’s three-party inquiry exists). See, *supra*, note 46 of this Report-Recommendation.

2. Plaintiff’s Argument that Defendants “Can’t Realistically Show” that Plaintiff Never Sent any Grievances or Appeals to the Great Meadow C.F. Inmate Grievance Clerk

Plaintiff also argues that Defendants “can’t realistically show” that Plaintiff never sent any grievances or appeals to the Great Meadow C.F. Inmate Grievance Clerk since that facility did not (during the time in question) have a grievance “receipt system.” (Dkt. No. 86,

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

at 25-29 [Plf.'s Memo. of Law].) This argument also fails.

*17 Plaintiff appears to misunderstand the parties' respective burdens on Defendants' motion for summary judgment. Even though a failure to exhaust is an affirmative defense that a defendant must plead and prove, once a defendant has met his initial burden of establishing the absence of any genuine issue of material fact regarding exhaustion (which initial burden has been appropriately characterized as "modest"),^{FN53} the burden then shifts to the nonmoving party to come forward with specific facts showing that there is a genuine issue for trial regarding exhaustion. *See, supra*, Part III of this Report-Recommendation.

^{FN53.} *See Ciaprazi v. Goord*, 02-CV-0915, 2005 WL 3531464, at *8 (N.D.N.Y. Dec.22, 2005) (Sharpe, J.; Peebles, M.J.) (characterizing defendants' threshold burden on a motion for summary judgment as "modest") [citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)]; *accord, Saunders v. Ricks*, 03-CV-0598, 2006 WL 3051792, at *9 & n. 60 (N.D.N.Y. Oct.18, 2006) (Hurd, J., adopting Report-Recommendation of Lowe, M.J.), *Smith v. Woods*, 03-CV-0480, 2006 WL 1133247, at *17 & n. 109 (N.D.N.Y. Apr.24, 2006) (Hurd, J., adopting Report-Recommendation of Lowe, M.J.).

Here, it is an uncontroverted fact, for purposes of Defendants' motion, that (1) grievance records at Great Meadow C.F. indicate that Plaintiff never filed a timely grievance alleging that he had been assaulted by corrections officers at Great Meadow C.F. in 2000, and (2) records maintained by CORC indicate that Plaintiff never filed an appeal (to CORC) regarding any grievance alleging that he had been so assaulted. (*See* Dkt. No. 78, Part 12, ¶¶ 39-40 [Defs.' Rule 7.1 Statement, providing accurate record citations].) Plaintiff has failed to properly controvert these factual assertions with specific citations to record evidence that actually creates a genuine issue of fact. (*See* Dkt. No. 85, Part 2, at 50-51 [Ex. N to Plf.'s Affid.].) As a result, under the Local Rules of Practice for this Court, Plaintiff has effectively "admitted" Defendants' referenced factual assertions. N.D.N.Y. L.R. 7.1(a)(3).

With respect to Plaintiff's argument that the referenced factual assertions are basically meaningless because Great Meadow C.F. did not (during the time in question) have a grievance "receipt system," that argument also fails. In support of this argument, Plaintiff cites unspecified record evidence that, although he sent a letter to Sally Reams (the IGP Supervisor at Great Meadow C.F. in May 2003) at some point and received a letter back from her on May 5, 2003, she later claimed that she had never received a letter from Plaintiff. (*Id.* at 29.) (*See* Dkt. No. 86, at 29 [Plf.'s Memo. of Law].) After examining Plaintiff's original Affidavit and exhibits, I located and carefully read the documents in question. (Dkt. No. 85, Part 1, ¶ 23 [Plf.'s Affid.]; Dkt. No. 85, Part 2 [Exs. F and G to Plf.'s Affid.].)

These documents do not constitute sufficient evidence to create a triable question of fact on the issue of whether, in August and/or September of 2000, Great Meadow C.F. did not have a grievance "receipt system." At most, they indicate that (1) at some point, nearly three years after the events at issue, Plaintiff (while incarcerated at Attica C.F.) wrote to Ms. Reams complaining about the alleged assault on August 17, 2000, (2) she responded to Plaintiff, on May 5, 2003, that he must grieve the issue at Attica C.F., where he must request permission to file an untimely grievance, and (3) at some point between April 7, 2003, and June 23, 2003, Ms. Reams informed Mr. Eagen that she did not "remember" receiving "correspondence" from Plaintiff. (*Id.*) The fact that Ms. Reams, after the passing of several weeks and perhaps months, did not retain an independent memory (not record) of receiving a piece of "correspondence" (not grievance) from Plaintiff (who was not an inmate currently incarcerated at her facility) bears little if any relevance on the issue of whether Great Meadow C.F. had, in April and/or May of 2003, a mechanism by which it recorded its receipt of *grievances*. Moreover, whether or not Great Meadow C.F. had a grievance "receipt system" in April and/or May of 2003 bears little if any relevance to whether it had a grievance "receipt system" in August and/or September of 2000.

*18 It should be emphasized that Defendants have adduced record evidence specifically establishing that, in August and September 2000, Great Meadow C.F. had a *functioning* grievance-recording process through which,

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

when a prisoner (and specifically Plaintiff) filed a grievance, it was “assign[ed] a number, title and code” and “log[ged] ... into facility records.” (Dkt. No. 78, Part 6, ¶¶ 7-9 [Bellamy Decl.]; Dkt. No. 78, Part 7, at 2 [Ex. A to Bellamy Decl.] Dkt. No. 78, Part 8, ¶ 4 [Brooks Decl.]; Dkt. No. 78, Part 9, at 6 [Ex. B to Brooks Decl.].)

Finally, even if Great Meadow C.F. did not (during the time in question) have a functioning grievance-recording process (thus, resulting in Plaintiff's alleged grievance never being responded to), Plaintiff still had the duty to appeal that non-response to the next level. *See, supra*, note 46 of this Report-Recommendation.

3. Plaintiff's Argument that the Determination He Received from CORC Satisfied the PLRA's Exhaustion Requirement

Plaintiff argues that the determination he received from CORC (at some point) satisfied the PLRA's exhaustion requirement. (Dkt. No. 86, at 30-38 [Plf.'s Memo. of Law].) This argument also fails.

Plaintiff does not clearly articulate the specific portion of the record where this determination is located. (*See id.* at 30 [Plf.'s Affid., referencing merely “plaintiff's affidavit and exhibits”].) Again, the Court has no duty to *sua sponte* scour the 209 pages that comprise Plaintiff's “affidavit and exhibits” for proof of a dispute of material fact, and I decline to do so (and recommend the Court decline to do so) for the reasons stated above in Part IV.A.1. of this Report-Recommendation. I have, however, in analyzing the various issues presented by Defendants' motion, reviewed what I believe to be the material portions of the documents to which Plaintiff refers. I report that Plaintiff appears to be referring to a determination by the Upstate C.F. Inmate Grievance Program, dated June 20, 2003, stating, “After reviewing [your June 11, 2003, Upstate C.F.] grievance with CORC, it has been determined that the grievance is unacceptable. It does not present appropriate mitigating circumstances for an untimely filing.” (Dkt. No. 85, Part 2, at 37 [Ex. J to Plf.'s Affid.]; *see also* Dkt. No. 85, Part 1, ¶¶ 22-34 [Plf.'s Affid.].)

There are two problems for Plaintiff with this document. First, this document does *not* constitute a written determination by CORC on a written appeal by

Plaintiff to CORC from an Upstate C.F. written determination. (*See* Dkt. No. 85, Part 2, at 37 [Ex. J to Plf.'s Affid.].) This fact is confirmed by one of Plaintiff's own exhibits, wherein DOCS IGP Director Thomas Eagen advises Plaintiff, “Contrary to the IGP Supervisor's assertion in his memorandum dated June 20, 2003, the IGP Supervisor's denial of an extension of the time frames to file your grievance from Great Meadow in August 2000 has not been reviewed by the Central Office Review Committee (CORC). The IGP Supervisor did review the matter with Central Office staff who is [sic] not a member of CORC.” (*See* Dkt. No. 85, Part 2, at 39 [Ex. K to Plf.'s Affid.].) At best, the document in question is an indication by Upstate C.F. that the success of an appeal by Plaintiff to CORC would be unlikely.

***19** Second, even if the document does somehow constitute a written determination by CORC on appeal by Plaintiff, the grievance to which the determination refers is a grievance filed by Plaintiff on June 11, 2003, at Upstate C.F., not a grievance filed by Plaintiff on August 30, 2000, at Great Meadow C.F. (Dkt. No. 85, Part 2, at 32-35 [Ex. I to Plf.'s Affid.].) Specifically, Plaintiff's June 11, 2003, grievance, filed at Upstate C.F., requested permission to file an admittedly *untimely* grievance regarding the injuries he sustained during the assault on August 17, 2000. (*Id.*)

A prisoner has not exhausted his administrative remedies with CORC when, years after failing to file a timely appeal with CORC, the prisoner requests *and is denied* permission to file an untimely (especially, a two-year-old) appeal with CORC due to an unpersuasive showing of “mitigating circumstances.” *See Burns v. Zwillinger*, 02-CV-5802, 2005 U.S. Dist. LEXIS 1912, at *11 (S.D.N.Y. Feb. 8, 2005) (“Since [plaintiff] failed to present mitigating circumstances for his untimely appeal to the IGP Superintendent, the CORC, or this Court, [defendant's] motion to dismiss on the grounds that [plaintiff] failed to timely exhaust his administrative remedies is granted.”); [Soto v. Belcher](#), 339 F.Supp.2d 592, 595 (S.D.N.Y.2004) (“Without mitigating circumstances, courts consistently have found that CORC's dismissal of a grievance appeal as untimely constitutes failure to exhaust available administrative remedies.”) [collecting cases]. If the rule were to the contrary, then, as

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

a practical matter, no prisoner could ever be said to have failed to exhaust his administrative remedies because, immediately before filing suit in federal court, he could perfunctorily write to CORC asking for permission to file an untimely appeal, and whatever the answer, he could claim to have completed the exhaustion requirement. The very reason for requiring that a prisoner obtain permission before filing an untimely appeal presumes that the permitted appeal would be required to complete the exhaustion requirement. Viewed from another standpoint, a decision by CORC to refuse the filing of an untimely appeal does not involve a review of the merits of the appeal.

4. Plaintiff's Argument that Defendants Rendered any Administrative Remedies “Unavailable” to Plaintiff

Plaintiff also argues that Defendants rendered any administrative remedies “unavailable” to Plaintiff, for purposes of the Second Circuit's above-described three-part exhaustion inquiry, by (1) failing to cause DOCS to provide proper “instructional provisions” in its directives, (2) failing to cause Great Meadow C.F. to have a grievance “receipt system,” and (3) “trash [ing]” Plaintiff's grievances and appeals. (Dkt. No. 86, at 39-45 [Plf.'s Memo. of Law].) This argument also fails.

In support of this argument, Plaintiff “incorporates by reference all the previously asserted points, Plaintiff's Affidavit in Opposition with supporting exhibits, as well as[] the entire transcripts of Defendants['] deposition on [sic] Plaintiff” (*Id.* at 40, 45.) Again, the Court has no duty to *sua sponte* scour the 265 pages that comprise Plaintiff's Affidavit, Supplemental Affidavit, exhibits, and deposition transcript for proof of a dispute of material fact, and I decline to do so (and recommend the Court decline to do so) for the reasons stated above in Part IV.A.1. of this Report-Recommendation. I have, however, in analyzing the various issues presented by Defendants' motion, reviewed the documents to which Plaintiff refers, and I report that I have found no evidence sufficient to create a genuine issue of triable fact on the issue of whether Defendants, *through their own actions*, have inhibited Plaintiff exhaustion of remedies so as to estop one or more Defendants from raising Plaintiff's failure to exhaust as a defense.

that he possesses any *personal knowledge* (only speculation) of any Defendant in this action having “trashed” his alleged grievance(s) and appeal(s),^{FN54} nor has he even adduced evidence that it was *one of the named Defendants in this action* to whom he handed his alleged grievance(s) and appeal(s) for delivery to the Great Meadow C.F. Inmate Grievance Program Clerk on August 30, 2000, September 13, 2000, and September 27, 2000.^{FN55} Similarly, the legal case cited by Plaintiff appears to have nothing to do with any Defendant to this action, nor does it even have to do with Great Meadow C.F.^{FN56}

^{FN54.} (See Dkt. No. 85, Part 1, ¶¶ 13-14, 16-17 [Plf.'s Affid., asserting, “Prison officials trashed my grievances and appeals since they claim not to have them despite [the] fact I sent them in a timely manner. It's [the] only reason they wouldn't have them.... Prison officials have a history of trashing grievances and appeals.... I've been subjected to having my grievances and appeals trashed prior to and since this matter and have spoken to alot [sic] of other prisoners whom [sic] said that they were also subjected to having their grievances and appeals trashed before and after this incident, in alot [sic] of facilities... Suspecting foul play with respect to my grievances and appeals, I wrote, and spoke to[,] prison officials and staff that did nothing to rectify the matter, which isn't surprising considering [the] fact that it's an old problem”].)

^{FN55.} (See Dkt. No. 85, Part 1, ¶ 6 [Plf.'s Affid., asserting only that “[o]n August 30th, 2000 plaintiff handed the correction officer collecting the mail in F Block SHU in the Great Meadow Correctional Facility an envelope addressed to the inmate grievance clerk ... which contained the grievances relative to this action at hand”]; Dkt. No. 85, Part 1, ¶ 9 [Plf.'s Affid., asserting only that “[o]n September 13, 2000, I appealed said grievances to [the] Superintendent by putting them in [an] envelope addressed to [the] inmate grievance clerk and handing it to [the] correction officer collecting the mail, in F-Block

*20 For example, Plaintiff has adduced no evidence

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

SHU [at] Great Meadow CF”]; Dkt. No. 85, Part 1, ¶ 11 [Plf.'s Affid., asserting only that “[o]n September 27th, 2000, I appealed said grievance ... to C.O.R.C. by putting them [sic] in [an] envelope addressed to [the] inmate grievance clerk and handing it to [the] correction officer collecting the mail in F-Block SHU [at] Great Meadow CF”].)

[FN56](#). (See Dkt. No. 85, Part 1, ¶ 15 [Plf.'s Affid., referencing case]; Dkt. No. 85, Part 2, at 16-17 [Ex. B to Plf.'s Affid., attaching a hand-written copy of case, which mentioned a prisoner's grievances that had been discarded in 1996 by an *unidentified* corrections officer at *Sing Sing Correctional Facility*].)

5. Record Evidence Creating Genuine Issue of Fact

Although I decline to *sua sponte* scour the lengthy record for proof of a triable issue of fact regarding exhaustion, I have, while deciding the many issues presented by Defendants' motion, had occasion to review in detail many portions of the record. In so doing, I have discovered evidence that I believe is sufficient to create a triable issue of fact on exhaustion.

Specifically, the record contains Plaintiff's testimony that (1) on August 30, 2000, he gave a corrections officer a grievance regarding the alleged assault on August 17, 2000, but he never received a response to that grievance, (2) on September 13, 2000, he gave a corrections officer an appeal (to the Superintendent) from that non-response, but again did not receive a response, and (3) on September 27, 2000, he gave a corrections officer an appeal (to CORC) from that non-response, but again did not receive a response.^{[FN57](#)}

[FN57](#). (See Dkt. No. 85, Part 1, ¶ 6 [Plf.'s Affid., asserting only that “[o]n August 30th, 2000 plaintiff handed the correction officer collecting the mail in F Block SHU in the Great Meadow Correctional Facility an envelope addressed to the inmate grievance clerk in which contained [sic] the grievances relative to this action at hand”]; Dkt. No. 85, Part 1, ¶ 9 [Plf.'s Affid., asserting only that “[o]n September 13, 2000, I appealed said grievances to [the] Superintendent

by putting them in [an] envelope addressed to [the] inmate grievance clerk and handing it to [the] correction officer collecting the mail; in F-Block SHU [at] Great Meadow CF....”]; Dkt. No. 85, Part 1, ¶ 11 [Plf.'s Affid., asserting only that “[o]n September 27h, 2000, I appealed said grievance ... to C.O.R.C. by putting them [sic] in [an] envelope addressed to [the] inmate grievance clerk and handing it to [the] correction officer collecting the mail in F-Block SHU [at] Great Meadow CF”].)

The remaining issue then, as it appears to me, is whether or not this affidavit testimony is so self-serving and unsubstantiated by other direct evidence that “no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint.” [FN58](#) Granted, this testimony appears self-serving. However, based on the present record, I am unable to find that the testimony is so wholly unsubstantiated by other direct evidence as to be incredible. Rather, this testimony appears corroborated by two pieces of evidence. First, the record contains what Plaintiff asserts is the grievance that he handed to a corrections officer on August 30, 2000, regarding the alleged assault on August 17, 2000. (Dkt. No. 85, Part 2, at 65-75 [Ex. Q to Plf.'s Affid.].) Second, the record contains two pieces of correspondence between Plaintiff and legal professionals *during or immediately following the time period in question* containing language suggesting that Plaintiff had received no response to his grievance. (Dkt. No. 85, Part 2, at 19-21 [Exs. C-D to Plf.'s Affid.].)

[FN58](#). See, *supra*, note 12 of this Report-Recommendation (collecting cases).

Stated simply, I find that sufficient record evidence exists to create a genuine issue of fact as to (1) whether Plaintiff's administrative remedies were, with respect to his assault grievance during the time in question, “available” to him, for purposes of the first part of the Second Circuit's three-part exhaustion inquiry, and/or (2) whether Plaintiff has shown “special circumstances” justifying his failure to comply with the administrative procedural requirements, for purposes of the third part of the Second Circuit's three-part exhaustion inquiry.

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

*21 As a result, I recommend that the Court deny this portion of Defendants' motion for summary judgment.

E. Whether Plaintiff Has Sufficiently Alleged, or Established, that Defendants Were Liable for the Policy to Review the Non-Life-Sustaining Medical Prescriptions of Prisoners Upon Arrival at Great Meadow C.F.

As explained above in Part II.A. of this Report-Recommendation, Defendants argue that, during his deposition in this action, Plaintiff asserted, for the first time, a claim that the medical staff at Great Meadow C.F. violated his rights under the Eighth Amendment by failing to honor non-life-sustaining medical prescriptions written at a former facility. (Dkt. No. 78, Part 13, at 3 [Defs.' Mem. of Law].) As a threshold matter, Defendants argue, this claim should be dismissed since Plaintiff never included the claim in his Second Amended Complaint, nor did Plaintiff ever file a motion for leave to file a Third Amended Complaint. (*Id.*) In any event, Defendants argue, even if the Court were to reach the merits of this claim, the Court should dismiss the claim because Plaintiff has failed to allege facts plausibly suggesting, or adduce evidence establishing, that Defendants were personally involved in the creation or implementation of DOCS' prescription-review policy, nor has Plaintiff provided such allegations or evidence indicating the policy is even unconstitutional. (*Id.*)

Plaintiff responds that “[he] didn't have to get in particular [sic] about the policy [of] discontinuing all incoming prisoners['] non[-]life[-]sustaining medications without examination and indiscriminently [sic] upon arrival at [Great Meadow] C.F. in [his Second] Amended Complaint. Pleading[s] are just supposed to inform [a] party about [a] claim[,] and plaintiff informed defendant [of] the nature of [his] claims including [the claim of] inadequate medical care. And discovery revealed [the] detail[s] [of that claim] as [Plaintiff had] intended.” (Dkt. No. 88, at 10 [Plf.'s Supp. Memo. of Law].) In addition, Plaintiff responds that Defendant Paolano must have been personally involved in the creation and/or implementation of the policy in question since he was the Great Meadow Health Services Director. (*Id.* at 10.)

I agree with Defendants that this claim is not properly

before this Court. Plaintiff's characterization of the notice-pleading standard, and of the contents of his Amended Complaint, are patently without support (both legally and factually). It has long been recognized that a “claim,” under [Fed.R.Civ.P. 8](#), denotes “the aggregate of operative facts which give rise to a right enforceable in the courts.” ^{FN59} Clearly, Plaintiff's Second Amended Complaint alleges no facts whatsoever giving rise to an asserted right to be free from the application of the prescription-review policy at Great Meadow C.F. Indeed, his Second Amended Complaint—which asserts Eighth Amendment claims arising *solely* out of events that (allegedly) transpired on August 17, 2000—says nothing at all of the events that transpired immediately upon his arrival at Great Meadow C.F. in early August of 2000, nor does the Second Amended Complaint even casually mention the words “prescription,” “medication” or “policy.” (*See generally* Dkt. No. 10 [Second Am. Compl.].)

^{FN59.} [Original Ballet Russe, Ltd. v. Ballet Theatre, Inc.](#), 133 F.2d 187, 189 (2d Cir.1943); [United States v. Iroquois Apartments, Inc.](#), 21 F.R.D. 151, 153 (E.D.N.Y.1957); [Birnbaum v. Birrell](#), 9 F.R.D. 72, 74 (S.D.N.Y.1948).

*22 Furthermore, under the notice-pleading standard set forth by [Fed.R.Civ.P. 8\(a\)\(2\)](#), to which Plaintiff refers in his Supplemental Memorandum of Law, Defendants are entitled to *fair notice* of Plaintiff's claims. ^{FN60} The obvious purpose of this rule is to protect defendants from undefined charges and to facilitate a proper decision on the merits. ^{FN61} A complaint that fails to provide such fair notice “presents far too heavy a burden in terms of defendants' duty to shape a comprehensive defense and provides no meaningful basis for the Court to assess the sufficiency of [plaintiff's] claims.” ^{FN62} This fair notice does not occur where, as here, news of the claim first springs up in a deposition more than two years after the action was commenced, approximately seven months after the amended-pleading deadline expired, and approximately two weeks before discovery in the action was scheduled to close. (*Compare* Dkt. No. 1 [Plf.'s Compl., filed 8/14/03] with Dkt. No. 42, at 1-2 [Pretrial Scheduling Order setting amended-pleading deadline as 2/28/05] and Dkt. No. 78, Part 11, at 52-53 [Plf.'s Depo.

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

Transcript, dated 9/30/05] and Dkt. No. 49 [Order setting discovery deadline as 10/14/05].)

[FN60. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 1634, 161 L.Ed.2d 577 \(2005\)](#) (the statement required by [Fed.R.Civ.P. 8 \[a\]\[2\]](#) must “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests”).

[FN61. *Ruffolo v. Oppenheimer & Co., Inc.*, 90-CV-4593, 1991 WL 17857, at *2 \(S.D.N.Y. Feb.5, 1991\); *Howard v. Koch*, 575 F.Supp. 1299, 1304 \(E.D.N.Y.1982\); *Walter Reade’s Theatres, Inc. v. Loew’s Inc.*, 20 F.R.D. 579, 582 \(S.D.N.Y.1957\).](#)

[FN62. *Gonzales v. Wing*, 167 F.R.D. 352, 355 \(N.D.N.Y.1996\)](#) (McAvoy, J.), *aff’d*, [113 F.3d 1229 \(2d Cir.1997\)](#) (unpublished table opinion). Consistent with the Second Circuit’s application of [§ 0.23 of the Rules of the U.S. Court of Appeals for the Second Circuit](#), I cite this unpublished table opinion, not as precedential authority, but merely to show the case’s subsequent history. *See, e.g., Photopaint Tech., LLC v. Smartlens Corp.*, 335 F.3d 152, 156 (2d Cir.2003) (citing, for similar purpose, unpublished table opinion of [Gronager v. Gilmore Sec. & Co.](#), 104 F.3d 355 [2d Cir.1996]).

Under the circumstances, the mechanism by which to assert such a late-blossoming claim was a motion to reopen the amended-pleading filing deadline (the success of which depended on a showing of cause), coupled with a motion for leave file a Third Amended Complaint (the success of which depended, in part, on a showing of lack of prejudice to Defendants, as well as a lack of futility). Plaintiff never made such motions, nor showed such cause.

I acknowledge that, generally, the liberal notice-pleading standard set forth by [Fed.R.Civ.P. 8](#) is applied with even greater force where the plaintiff is proceeding *pro se*. In other words, while all pleadings are to be construed liberally, *pro se* civil rights pleadings are

generally construed with an *extra* degree of liberality. As an initial matter, I have already concluded, based on my review of Plaintiff’s extensive litigation experience, that he need not be afforded such an extra degree of leniency since the rationale for such an extension is a *pro se* litigant’s inexperience with the court system and legal terminology, and here Plaintiff has an abundance of such experience. *See, supra*, notes 21-25 of this Report-Recommendation. Moreover, even if he were afforded such an extra degree of leniency, his phantom prescription-review claim could not be read into his Second Amended Pleading, for the reasons discussed above. (I note that, even when a plaintiff is proceeding *pro se*, “all normal rules of pleading are not absolutely suspended.”) ^{FN63}

[FN63. *Stinson v. Sheriff’s Dep’t of Sullivan Cty.*, 499 F.Supp. 259, 262 & n. 9 \(S.D.N.Y.1980\); accord, *Standley v. Dennison*, 05-CV-1033, 2007 WL 2406909, at *6, n. 27 \(N.D.N.Y. Aug.21, 2007\)](#) (Sharpe, J., adopting report-recommendation of Lowe, M.J.); [*Muniz v. Goord*, 04-CV-0479, 2007 WL 2027912, at *2 \(N.D.Y.Y. July 11, 2007\)](#) (McAvoy, J., adopting report-recommendation of Lowe, M.J.); [*DiProjetto v. Morris Protective Serv.*, 489 F.Supp.2d 305, 307 \(W.D.N.Y.2007\); *Cosby v. City of White Plains*, 04-CV-5829, 2007 WL 853203, at *3 \(S.D.N.Y. Feb.9, 2007\); *Lopez v. Wright*, 05-CV-1568, 2007 WL 388919, at *3, n. 11 \(N.D.N.Y. Jan.31, 2007\)](#) (Mordue, C.J., adopting report-recommendation of Lowe, M.J.); [*Richards v. Goord*, 04-CV-1433, 2007 WL 201109, at *5 \(N.D.N.Y. Jan.23, 2007\)](#) (Kahn, J., adopting report-recommendation of Lowe, M.J.); [*Ariola v. Onondaga County Sheriff’s Dept.*, 04-CV-1262, 2007 WL 119453, at *2, n. 13 \(N.D.N.Y. Jan.10, 2007\)](#) (Hurd, J., adopting report-recommendation of Lowe, M.J.); [*Collins v. Fed. Bur. of Prisons*, 05-CV-0904, 2007 WL 37404, at *4 \(N.D.N.Y. Jan.4, 2007\)](#) (Kahn, J., adopting report-recommendation of Lowe, M.J.).

Nor could Plaintiff’s late-blossoming prescription-review claim properly be read into his papers in opposition to Defendants’ motion for summary

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

(Cite as: 2008 WL 2522324 (N.D.N.Y.))

judgment. Granted, a *pro se* plaintiff's papers in opposition to a *motion to dismiss* may sometimes be read as effectively amending a pleading (e.g., if the allegations in those papers are consistent with those in the pleading). However, a *pro se* plaintiff's papers in opposition to a *motion for summary judgment* may not be so read, in large part due to prejudice that would inure to the defendants through having the pleading changed after discovery has occurred and they have gone through the expense of filing a motion for summary judgment.^{FN64}

FN64. See Auguste v. Dept. of Corr., 424 F.Supp.2d 363, 368 (D.Conn.2006) ("Auguste [a *pro se* civil rights plaintiff] cannot amend his complaint in his memorandum in response to defendants' motion for summary judgment.") [citations omitted].

*23 Finally, in the event the Court decides to construe Plaintiff's Second Amended Complaint as somehow asserting this claim, I agree with Defendants that the Court should dismiss that claim, also for the reasons discussed above in Part IV.A.2. of this Report-Recommendation. Specifically, Plaintiff has failed to adduce evidence establishing that Defendant Paolano (or any named Defendant in this action) was personally involved in the creation or implementation of DOCS' prescription-review policy, nor has Plaintiff provided evidence establishing that the policy is even unconstitutional. See, *supra*, Part IV.A.2. of this Report-Recommendation.

ACCORDINGLY, it is

ORDERED that the Clerk's Office shall, in accordance with note 1 of this Order and Report-Recommendation, correct the docket sheet to remove the names of Defendants Englese, Edwards, Bump, Smith, Paolano, and Nesmith as "counter claimants" in this action; and it is further

RECOMMENDED that Defendants' motion for summary judgment (Dkt. No. 78) be **GRANTED in part** (i.e., to the extent that it requests the dismissal with prejudice of Plaintiff's claims against Defendants Paolano and Nesmith) and **DENIED in part** (i.e., to the extent that it requests dismissal of Plaintiff's claims against the

remaining Defendants on the grounds of Plaintiff's failure to exhaust available administrative remedies) for the reasons stated above.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** Roldan v. Racette, 984 F.2d 85, 89 (2d Cir.1993) (citing Small v. Sec'y of Health and Human Servs., 892 F.2d 15 [2d Cir.1989]); 28 U.S.C. § 636(b); Fed.R.Civ.P. 6(a), 6(e), 72.

N.D.N.Y.,2008.

Murray v. Palmer

Not Reported in F.Supp.2d, 2008 WL 2522324 (N.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,

N.D. New York.

Thomas GOODSON, Plaintiff,

v.

“John” SILVER, Sergeant, Clinton Corr. Facility; and
“John” Renadette, Corr. Officer, Clinton Corr. Facility,
Defendants.

No. 9:09–CV–0494 (GTS/DRH).

Sept. 25, 2012.

Hiscock & Barclay LLP, [Brittany E. Aungier, Esq.](#),
[Gabriel M. Nugent, Esq.](#), of Counsel, Syracuse, NY, for
Plaintiff.

Hon. [Eric T. Schneiderman](#), Attorney General for the State
of New York, [Cathy Y. Sheehan, Esq.](#), Assistant Attorney
General, of Counsel, Albany, NY, for Defendants.

MEMORANDUM–DECISION and ORDER

[GLENN T. SUDDABY](#), District Judge.

*1 The trial in this prisoner civil rights action, filed *pro se* by Thomas Goodson (“Plaintiff”) pursuant to [42 U.S.C. § 1983](#), began with an evidentiary hearing before the undersigned on September 18, 2012, regarding the affirmative defense, asserted by Sergeant “John” Silver and Corrections Officer “John” Renadette (“Defendants”), that Plaintiff failed to exhaust his available administrative remedies, as required by the Prison Litigation Reform Act, before filing this action on March 12, 2009. At the hearing, documentary evidence was admitted, and testimony was taken. At the conclusion of the hearing, the undersigned dismissed Plaintiff’s action for failure to exhaust his available administrative remedies, and indicated that a written decision would follow. This is that written decision.

I. RELEVANT BACKGROUND

Through their pre-hearing briefs and hearing

summation, the parties have demonstrated an accurate understanding of the claims and factual allegations asserted in Plaintiff’s Complaint, the relevant portions of the procedural history of this action, and the legal and factual issues relevant to the hearing. As a result, the Court will not repeat that information in its entirety in this Decision and Order, which is intended primarily for the review of the parties. Rather, the Court will merely state as follows.

Plaintiff dated, and thus filed, his Complaint in this action on March 12, 2009. (Dkt. No. 1.) Construed with the utmost of special liberality, that portion of Plaintiff’s Complaint surviving the Court’s Decision and Order of March 27, 2012, alleges that on April 4, 2006, at Clinton Correctional Facility (“Clinton C.F.”), the two above-captioned Defendants violated his constitutional rights in the following manner: (1) Defendant Silver sexually assaulted Plaintiff in a bathroom while escorting him to a physical therapy appointment, in violation of the Eighth Amendment; and (2) Defendant Renadette failed to protect Plaintiff from the alleged sexual assault, by knowing of Defendant Menard’s physical threat against Plaintiff, by having reason to know that Defendant Silver intended to harm Plaintiff, but failing to accompany Plaintiff into the bathroom during his transport to physical therapy, in violation of the Eighth Amendment. (*See generally* Dkt. Nos. 1, 49.)

On May 11, 2012, Plaintiff was appointed pro bono trial counsel. (Dkt. No. 50.) On August 7, 2012, Defendants filed a letter-motion requesting a pre-trial evidentiary hearing regarding Plaintiff’s asserted failure to exhaust his available administrative remedies before filing this action. (Dkt. No. 57.) On August 10, 2012, the Court granted that request. (Text Order filed Aug. 10, 2012.)

Generally, in their pre-hearing brief, and during their hearing summation, Defendants argued as follows: (1) the Supreme Court’s decision in [Woordford v. Ngo](#), 548 U.S. 81, 92–93 (2006), required Plaintiff to have “properly” exhausted his available administrative remedies before filing this action (i.e., complete the administrative review process in accordance with the applicable procedural

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

rules, including deadlines); and (2) Plaintiff did not do so in this case, in large part because an investigation by the New York State Office of the Inspector General does not suffice to exhaust administrative remedies without an appeal to the New York State Department of Corrections and Community Supervision (“DOCCS”) Central Office Review Committee (“CORC”). (Dkt. No. 76, at 4–6 [attaching pages “4” through “6” of Defs.’ Pre-Hrg. Brief]; Hrg. Transcript, at 122–129.)

*2 Generally, in his pre-hearing brief, and during their hearing summation, Plaintiff argued that, pursuant to the third part of the three-part inquiry established by the Second Circuit for exhaustion of administrative remedies, special circumstances exist justifying Plaintiff’s failure to exhaust his available administrative remedies before filing this action, due to the following: (1) the purported fact that (due to fear of reprisal) his speech was chilled, or at least he was hopelessly distracted, while he was at Clinton C.F. following the alleged assault; (2) the purported fact that his mail was interfered during the two days following the alleged assault; (3) the purported fact that, procedurally, he could not file a formal grievance at Clinton C.F. after he was transferred from there; (4) the fact that his hand-delivered letter to Maureen Bosco, which was brought to the attention of Clinton C.F. Deputy Superintendent of Security Jeff Tedford and referred by him to the IG, was effectively treated as a harassment grievance; (5) the purported fact that an appeal to CORC would have been futile under the circumstances because CORC would merely have “rubber stamped” the IG’s conclusion that Plaintiff’s claims were unsubstantiated; and (6) the purported fact that the IG investigation served the same purpose as the grievance process. (Dkt. No. 68, at 5–8 [attaching pages “3” through “6” of Plf.’s Pre-Hrg. Brief]; Hrg. Transcript, at 129–131.)

Generally, at the hearing, documentary evidence was admitted, and testimony was taken of Plaintiff as well as Defendants’ five witnesses (Grievance Sergeant Scott McLean, Grievance Supervisor Christine Gregory, Legal Office Liaison Tammy Irwin, Inmate Grievance Program Director Karen Bellamy, and Inspector General Senior Investigator Anthony Misercola). (*See generally* Hrg. Transcript and Exs.) While various facts were of course were disputed, certain facts were uncontroverted,

including the following: (1) before the occurrence of the assault alleged in this action, Plaintiff had a good understanding of the DOCCS grievance process, and had some experience filing an appeal to CORC, having done so two times, regarding different subjects, and having written to CORC a third time about a perceived failure to respond to an appeal; (2) the assault is alleged to have occurred on April 4, 2006, at Clinton C.F.; (3) at the time, Plaintiff was housed in the Clinton C.F. Special Housing Unit (“SHU”), where paper and grievance forms were available to him; (4) on or about April 7, 2006, Plaintiff had Office of Mental Health (“OMH”) Social Worker Todd Asselin hand-deliver a letter to OMH Unit Chief Maureen Bosco complaining of the alleged assault; (5) on or about April 12, 2006, Plaintiff was transferred to the Clinton C.F. Mental Health Center for observation; (6) on or about April 19, 2006, Plaintiff was transferred to the Central New York Psychiatric Center (“CNYPC”), where he orally complained of the alleged assault to a risk management specialist on or about April 21, 2006; (7) on or about April 24, 2006, Plaintiff’s complaint of an alleged assault was referred to the New York State Department of Correctional Services Inspector General’s Office (“IG”) for an investigation; (8) the investigation was conducted by IG Senior Investigator Anthony Misercola; (9) on or about May 17, 2006, Plaintiff was transferred to Downstate Correctional Facility, and the next day to Great Meadow Correctional Facility; and (10) on or about September 20, 2006, after the IG’s investigation was over, the IG concluded that Plaintiff’s allegations were unsubstantiated. (*Id.*)

II. RELEVANT LEGAL STANDARD

*3 The Prison Litigation Reform Act of 1995 (“PLRA”) requires that prisoners who bring suit in federal court must first exhaust their available administrative remedies: “No action shall be brought with respect to prison conditions under [§ 1983](#) ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” [42 U.S.C. § 1997e](#). The PLRA was enacted “to reduce the quantity and improve the quality of prisoner suits” by “afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.” [Porter v. Nussle, 534 U.S. 516, 524–25](#)

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

(2002). In this regard, exhaustion serves two major purposes. First, it protects “administrative agency authority” by giving the agency “an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of the agency's procedures.” *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). Second, exhaustion promotes efficiency because (a) “[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court,” and (b) “even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration.” *Woodford*, 548 U.S. at 89. “[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter*, 534 U.S. at 532.

In accordance with the PLRA, the New York State Department of Correctional Services (“DOCS”) has made available a well-established inmate grievance program. 7 N.Y.C.R.R. § 701.7. Generally, the DOCS Inmate Grievance Program (“IGP”) involves the following threestep procedure for the filing of grievances. 7 N.Y.C.R.R. §§ 701.5, 701.6(g), 701.7.^{FN1} First, an inmate must file a complaint with the facility's IGP clerk within a certain number of days of the alleged occurrence.^{FN2} If a grievance complaint form is not readily available, a complaint may be submitted on plain paper. A representative of the facility's inmate grievance resolution committee (“IGRC”) has a certain number of days from receipt of the grievance to informally resolve the issue. If there is no such informal resolution, then the full IGRC conducts a hearing within a certain number of days of receipt of the grievance, and issues a written decision within a certain number of days of the conclusion of the hearing. *Second*, a grievant may appeal the IGRC decision to the facility's superintendent within a certain number of days of receipt of the IGRC's written decision. The superintendent is to issue a written decision within a certain number of days of receipt of the grievant's appeal. *Third*, a grievant may appeal to the central office review committee (“CORC”) within a certain number of days of receipt of the superintendent's written decision. CORC is to render a written decision within a certain number of

days of receipt of the appeal.

^{FN1}. See also *Murray v. Palmer*, 03-CV-1010, 2010 WL 1235591, at *1 & n. 1 (N.D.N.Y. March 31, 2010) [citation omitted].

^{FN2}. The Court uses the term “a certain number of days” rather than a particular time period because (1) since the three-step process was instituted, the time periods imposed by the process have changed, and (2) the time periods governing any particular grievance depend on the regulations and directives pending during the time in question.

*4 Moreover, there is an expedited process for the review of complaints of inmate harassment or other misconduct by corrections officers or prison employees. 7 N.Y.C.R.R. § 701.8. In the event the inmate seeks expedited review, he or she may report the misconduct to the employee's supervisor. The inmate then files a grievance under the normal procedures outlined above; however, all grievances alleging employee misconduct are given a grievance number, and sent immediately to the superintendent for review. The superintendent or his designee shall “promptly determine whether the grievance, if true, would represent a bona fide case of harassment,” and if so, then the superintendent shall initiate an investigation of the complaint, either “in-house,” by the Inspector General's Office, or by the New York State Police Bureau of Criminal Investigations. An appeal of the adverse decision of the superintendent may be taken to the CORC as in the regular grievance procedure.

It is important to note that these procedural requirements contain certain safeguards. For example, if an inmate could not file such a complaint within the required time period after the alleged occurrence, he or she could apply to the facility's IGP Supervisor for an exception to the time limit based on mitigating circumstances. If that application was denied, the inmate could file a complaint complaining that the application was wrongfully denied.^{FN3}

^{FN3}. See *Murray v. Palmer*, 03-CV-1010, 2010 WL 1235591, at *2 & n. 3 (N.D.N.Y. March 31,

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

[2010](#)) (citing *Groves v. Knight*, 05–CV–0183, Decision and Order at 3 [N.D.N.Y. filed Aug. 4, 2009], an appeal from which was subsequently dismissed as frivolous, *see Groves v. Knight*, No. 09–3641, Mandate [2d Cir. filed Jan. 15, 2010].)

Moreover, any failure by the IGRC or the superintendent to timely respond to a grievance or first-level appeal, respectively, can-and must-be appealed to the next level, including CORC, to complete the grievance process.^{FN4} There appears to be a conflict in case law regarding whether the IGRC's or superintendent's non-response must be appealed to the next level where the inmate's grievance was never assigned a grievance number.^{FN5} After carefully reviewing this case law, the Court finds that the weight of authority persuasively answer this question in the affirmative.^{FN6} The Court notes that, if the inmate adequately describes, in his appeal to the superintendent, the substance of his grievance (or if the plaintiff attaches, to his appeal, a copy of his grievance), it would appear that there is something for the superintendent to review.

^{FN4.} [7 N.Y.C.R.R. § 701.6\(g\)](#) (“[M]atters not decided within the time limits may be appealed to the next step.”); *see also Murray v. Palmer*, 03–CV–1010, 2010 WL 1235591, at *2 & n. 4 (N.D.N.Y. March 31, 2010) (“[A]ny failure by the IGRC or the superintendent to timely respond to a grievance or first-level appeal, respectively, can-and must-be appealed to the next level, including CORC, to complete the grievance process.”) [collecting cases]; *see also Williams v. Hupkowitz*, 04–CV–0051, 2007 WL 1774876, at *4 (W.D.N.Y. June 18, 2007) (“Even assuming that an inmate received no timely official response as contemplated by the regulations to a grievance at any stage in the inmate grievance process, the inmate could nevertheless appeal such grievance to the next level, and the failure to do so constitutes a failure to exhaust his administrative remedies as required under the PLRA.”).

^{FN5.} [Murray](#), 2010 WL 1235591, at *2 & n. 5 [citing cases].

^{FN6.} *See, e.g., Murray v. Palmer*, 03–CV–1010, 2008 WL 2522324, at *15, 18 & n. 46 (N.D.N.Y. June 20, 2008) (Hurd, J., adopting Report–Recommendation of Lowe, M.J.) (“[E]ven if Great Meadow C.F. did not (during the time in question) have a functioning grievance-recording process (thus, resulting in Plaintiff's alleged grievance never being responded to), Plaintiff still had the duty to appeal that non-response to the next level.”), *accord, Midalgo v. Bass*, 03–CV–1128, 2006 WL 2795332, at *7 (N.D.N.Y. Sept. 26, 2006) (Mordue, C.J., adopting Report–Recommendation of Treece, M.J.) (observing that plaintiff was “requir[ed]” to seek an appeal to the superintendent, even though he never received a response to his grievance of April 26, 2003, which was never assigned a grievance number); [Collins v. Cunningham](#), 06–CV–0420, 2009 WL 2163214, at *3, 6 (W.D.N.Y. July 20, 2009) (rejecting plaintiff's argument that his administrative remedies were not available to him where his grievance of March 20, 2004, was not assigned a grievance number); [Wesley v. Hardy](#), 05–CV–6492, 2006 WL 3898199, at *4 (S.D.N.Y. Dec. 12, 2006) (“If a prisoner submits a grievance and receives no response, he cannot be considered to have been actively obstructed or frustrated, as he is free to appeal to the next level of review.”), *accord, Walters v. Carpenter*, 2004 WL 1403301, at *3 (S.D.N.Y. June 22, 2004); [Veloz v. New York](#), 339 F.Supp.2d 505, 515–16 (S.D.N.Y. 2004) (rejecting inmate's argument that the prison's grievance procedure had been rendered unavailable to him by the practice of prison officials' losing or destroying his grievances, because, *inter alia*, he should have “appeal[ed] these claims to the next level once it became clear to him that a response to his initial filing was not forthcoming”); [Hernandez v. Coffey](#), 99–CV–11615, 2003 WL 22241431, at *4 (S.D.N.Y. Sept. 29, 2003) (rejecting plaintiff's argument that he could not have exhausted because he never received a grievance number,

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

finding he could nonetheless have appealed any such non-response to the next level); Reyes v. Punzal, 206 F.Supp.2d 431, 433 (W.D.N.Y.2002) (“Even assuming that plaintiff never received a response to his grievance, he had further administrative avenues of relief open to him.”); Hemphill v. New York, 198 F.Supp.2d 546, 549 (S.D.N.Y.2002) (“Had plaintiff utilized this procedure, any failure by Artuz to render a decision on his matter within twelve working days could have been appealed to Albany, thus completing the grievance cycle and exhausting his remedies in a matter of weeks.”), *vacated and remanded on other grounds*, 380 F.3d 680 (2d Cir.2004); cf. Hernandez v. Coffey, 582 F.3d 303, 305, 309, n. 3 (2d Cir.2009) (“Our ruling in no way suggests that we agree with Hernandez’s arguments regarding exhaustion or justification for failure to exhaust [which included an argument that the Inmate Grievance Program was not available to him because, when he filed a grievance at the first stage of the Program, he received no response and his grievance was not assigned a grievance number].”).

Generally, if a prisoner has failed to follow each of the required three steps of the abovedescribed grievance procedure prior to commencing litigation, he has failed to exhaust his administrative remedies. Ruggiero v. County of Orange, 467 F.3d 170, 175 (2d Cir.2006) (citing Porter, 534 U.S. at 524). However, the Second Circuit has held that a three-part inquiry is appropriate where a defendant contends that a prisoner has failed to exhaust his available administrative remedies, as required by the PLRA. Hemphill v. State of New York, 380 F.3d 680, 686, 691 (2d Cir.2004), *accord*, Ruggiero, 467 F.3d at 175. First, “the court must ask whether [the] administrative remedies [not pursued by the prisoner] were in fact ‘available’ to the prisoner.” Hemphill, 380 F.3d at 686 (citation omitted). Second, if those remedies were available, “the court should ... inquire as to whether [some or all of] the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it ... or whether the defendants’ own actions inhibiting the [prisoner’s] exhaustion of remedies may estop one or more of the defendants from raising the plaintiff’s failure to

exhaust as a defense.” *Id.* [citations omitted]. Third, if the remedies were available and some of the defendants did not forfeit, and were not estopped from raising, the non-exhaustion defense, “the Court should consider whether ‘special circumstances’ have been plausibly alleged that justify the prisoner’s failure to comply with the administrative procedural requirements.” *Id.* [citations and internal quotations omitted].

*5 Finally, two points bear mentioning regarding exhaustion hearings. First, the Second Circuit has ruled that a plaintiff in a lawsuit governed by PLRA is not entitled to a jury trial on disputed factual issues relating to his exhaustion of administrative remedies; rather, PLRA exhaustion is a matter of judicial administration. Messa v. Goord, 652 F.3d 305, 308–10 (2d Cir.2011). Second, given that non-exhaustion is an affirmative defense, the defendant bears the burden of showing that a prisoner has failed to exhaust his available administrative remedies.^{FN7} However, once a defendant has adduced reliable evidence that administrative remedies were available to the plaintiff and that the plaintiff nevertheless failed to exhaust those administrative remedies, the plaintiff must then “counter” the defendant’s assertion by showing exhaustion, unavailability, estoppel, or “special circumstances.”^{FN8} As a result, practically speaking, while the burden on this affirmative defense remains at all times on the defendant, the plaintiff may sometimes have to adduce evidence in order to defeat it.

^{FN7.} Murray, 2010 WL 1235591, at *4 [citation omitted].

^{FN8.} *Id.* at *4 & n. 17 [collecting cases].

III. ANALYSIS

As an initial matter, the Court finds, after carefully considering the matter, that, before filing this action, Plaintiff did not exhaust his administrative remedies. For example, Plaintiff did not file a harassment grievance and then either (1) receive a decision on that grievance or (2) appeal the denial of, or non-response to, that grievance to CORC. The Court bases this finding on the following: (1) the conspicuous omission of any reference to the grievance process in Plaintiff’s otherwise detailed verified

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

Complaint; (2) DOCCS' log of Plaintiff's grievances while at Clinton C.F.; (3) DOCCS' log of Plaintiff's grievance appeals to CORC; (4) the hearing testimony of Grievance Supervisor Christine Gregory; (5) the hearing testimony of Legal Office Liaison Tammy Irwin; and (6) the hearing testimony of Inmate Grievance Program Director Karen Bellamy. (Dkt. No. 1; Hrg. Exs. D-3E, D-4E; Hrg. Transcript, at 34-105.) ^{FN9}

^{FN9}. The Court rejects as incredible Plaintiff's claim that, at some point in time during his stay at the CNYPC (i.e., between April 19, 2006, and May 17, 2006), he sent a letter to the Inmate Grievance Program Director Thomas Egan, who returned to Plaintiff a copy of that letter with the word "received" stamped on it, based on (1) Plaintiff's hearing testimony and demeanor during that testimony, and (2) the conspicuous absence of that copy in the record (despite Plaintiff's claim that he possesses it). (Hrg. Transcript at 117-121; *see* Hrg. Exs.) In any event, and more importantly, because there had been no referral to the IG by Superintendent Artus, such a letter, which preceded the conclusion of the IG investigation by more than four months, could not have constituted an "appeal" from that investigation to CORC. Even if there had been a referral to the IG by Superintendent Artus, Plaintiff's letter to Director Egan would not have been an "appeal" for two independent reasons: (1) it was untimely because it appears to have been submitted more than four working days after that referral on April 24, 2006 (and Plaintiff's knowledge of the referral through his being interviewed by IG Senior Investigator Anthony Misercola on the same day); and (2) in any event, it was never actually *decided* by CORC, but (purportedly) stamped "received" by Director Egan with the advice that Plaintiff file a grievance.

As a result, the Court turns its attention to three-part inquiry established by the Second Circuit for exhaustion of administrative remedies under the PLRA. As the Court indicated above in Part I of this Decision and Order, even when liberally construed, Plaintiff's pre-trial brief and hearing summation do not take issue with either parts one

or two of that three-part inquiry; rather, they take issue only with part three of that inquiry. (*See generally* Dkt. No. 68; Hrg. Transcript, at 129-131.) However, in the interest of thoroughness, and to give context to the Court's analysis regarding step three of that inquiry, the Court will analyze all three steps.

A. Availability of Administrative Remedies

With regard to part one of the Second Circuit's three-part exhaustion inquiry, the Court finds, after carefully considering the matter, that administrative remedies were in fact available to Plaintiff during the time in question.

*6 More specifically, during the time in question, Plaintiff had 14 days after the alleged assault (i.e., until April 18, 2006) to file a grievance at Clinton C.F. He could have done this by receiving a grievance form or piece of plain paper from a grievance housing specialist during his or her rounds or upon Plaintiff's request, and then handing a completed grievance form or simple letter of complaint written on plain paper (or even a napkin) to a grievance housing specialist or an SHU correctional officer during his or her rounds for delivery to the grievance clerk for filing, on any day between April 4, 2006, and April 18, 2006 (when he was transferred to the CNYPC). While Plaintiff could have preceded this filing with the sending of a letter to his assailant's supervisor (in an effort to informally resolve the matter before filing), he need not have done so. Alternatively, after he was transferred to the CNYPC on April 19, 2006, he could have written a letter to the grievance clerk at Clinton C.F. requesting an exception to the deadline of April 18, 2006, based on mitigating circumstances (e.g., his poor mental health and his transfer to the Clinton C.F. Mental Health Center for observation). The Court bases these findings on the following: (1) the hearing testimony of Grievance Sergeant Scott McClean; (2) the hearing testimony of Inmate Grievance Program Director Karen Bellamy; (3) the hearing testimony of Plaintiff; (4) the version of DOCs Directive 4040 in effect during the time in question; and (5) the relevant case law. (Hrg. Transcript, at 2-34, 58-88, 106-121; Hrg. Ex. D-2E [attaching version of Directive 4040 dated July 12, 2006, which Sgt. McClean testified was "very, very close" to the version in effect before July 12, 2006].) ^{FN10}

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

FN10. See also *Hale v. Rao*, 768 F.Supp.2d 367, 376, n. 5 (N.D.N.Y. 2011) (Hurd, J.) (“This requirement [that a grievance be filed within 14 days of the incident] was amended on July 12, 2006, by another DOCS directive that extended the deadline to within 21 days of the incident.”); *Barnes v. Craft*, 04–CV–1269, 2007 WL 1017307, at *4 (N.D.N.Y. March 30, 2007) (Report–Recommendation of Lowe, M.J., adopted by Mordue, C.J.) (finding that the deadline for filing a grievance, for incident occurring on March 12, 2004, was 14 days of the incident); *Carini v. Austin*, 06–CV–5652, 2008 WL 151555, at *1 & n. 3 (S.D.N.Y. Jan. 14, 2008) (finding that the deadline for filing a grievance, for incident occurring on August 1, 2003, was 14 days of the incident).

Once his grievance was received, it would have been deemed to have been a harassment grievance and would have been forwarded directly to the Superintendent by the close of that business day. The Superintendent then would have had 12 working days in which to respond, unless he requested (and obtained Plaintiff's consent for) an extension of the response deadline, due to additional time needed for the completion of (1) an in-house investigation, (2) an investigation by IG, or (3) an investigation by the State Police. The Court bases these findings on the following: (1) the hearing testimony of Grievance Sergeant Scott McClean; (2) the hearing testimony of Inmate Grievance Program Director Karen Bellamy; (3) the version of DOCS Directive 4040 in effect during the time in question; and (4) the relevant case law. (Hrg. Transcript, at 2–34, 58–88; Hrg. Ex. D–2E.) ^{FN11}

FN11. See also *Rodriguez v. Mount Vernon Hosp.*, 09–CV–5691, 2010 WL 3825736, at *10 & n. 14 (S.D.N.Y. Sept. 7, 2010) (“The pre–2006 version of the regulations allowed the Superintendent 12 working days to render a decision [to a harassment grievance], as opposed to 25 calendar days under the current regulation.”), adopted by 2010 WL 3825715 (S.D.N.Y. Sep. 30, 2010); *Rhodes v. Hov*, 05–CV–0836, 2007 WL 1343649, at *4

(N.D.N.Y. May 5, 2007) (Report–Recommendation of Peebles, M.J., adopted by Scullin, J.) (finding that the deadline for a superintendent's response to a harassment grievance filed on July 7, 2004, was 12 working days of receipt of the grievance); *Hairston v. LaMarche*, 05–CV–6642, 2006 WL 2309592, at *1, 7 (S.D.N.Y. Aug. 10, 2006) (finding that the deadline for a superintendent's response to a harassment grievance filed on June 18, 2004, was 12 working days of receipt of the grievance).

After 12 working days, if his grievance was either denied or not responded to (and no extension was requested by the Superintendent and consented to by Plaintiff), Plaintiff had four working days in which to appeal the Superintendent's denial of, or non-response to, that grievance to CORC. Alternatively, if the Superintendent sought an extension of his response deadline pending an investigation (e.g., by the IG), Plaintiff had four working days after the new response deadline in which to appeal the Superintendent's denial of, or non-response to, that grievance to CORC (assuming the grievance was not granted). In either case, he could have filed his appeal, and/or sought an extension of the deadline in which to do so, even if he had been transferred from the facility. The Court bases these findings on the following: (1) the hearing testimony of Inmate Grievance Program Director Karen Bellamy; (2) the version of DOCS Directive 4040 in effect during the time in question; and (3) the relevant case law. (Hrg. Transcript, at 58–88; Hrg. Ex. D–2E.) ^{FN12}

FN12. See also *Rodriguez*, 2010 WL 3825736, at *10 & n. 15 (“The pre–2006 version of the regulations required that appeals [from the response to a harassment grievance] be filed within four working days of receipt of the response, as opposed to seven working days under current law.”); *Rhodes*, 2007 WL 1343649, at *4 (finding that the deadline for an inmate's appeal to CORC from a superintendent's response to a harassment grievance, as of July 7, 2004, was four working days of receipt of the response).

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

*7 During the time in question, Plaintiff knew all of this, (1) having received an SHU Inmate Orientation Manual describing his access to the inmate grievance mechanism, (2) having been incarcerated in DOCS 16 years at that point, having previously filed two appeal to CORC (and a third letter to CORC regarding a perceived non-response to an appeal), and (3) admittedly having a “good understanding” of the grievance process. The Court bases these findings on the following: (1) the hearing testimony of Grievance Sergeant Scott McClean; (2) the SHU Inmate Orientation Manual; (3) the hearing testimony of Inmate Grievance Program Director Karen Bellamy; (4) DOCCS' log of Plaintiff's grievance appeals to CORC; and (5) the hearing testimony of Plaintiff. (Hrg. Transcript, at 2–34, 58–88, 106–121; Hrg. Exs. D–4E, D–8E.)

The Court would add only that it specifically finds that, during the time in question, an inmate could file an extension request and letter of complaint regarding an assault at Clinton C.F. while confined at the CNYPC, by mailing them there on plain paper. Granted, during the time in question, some transferred inmates' grievances of assault could *conceivably* have been denied as moot by the IGRC (and any appeal precluded)-if the IGRC determined that the grievance affected *only the specific grievant* as opposed to other members of the facility. See [7 N.Y.C.R.R. § 701.3\(k\)\(2\)\(i\),\(ii\)](#) (version in effect in April 2006) (“If the IGRC majority determines that the [institutional] grievance is moot because it only affects the specific grievant ..., the IGRC shall dismiss and close the grievance ... If the grievance does affect other members of the facility population ..., the IGRC shall provide a recommendation or how to resolve the matter and forward the case to the superintendent for a determination.”).^{FN13} However, such a possibility does not render those inmates' administrative remedies unavailable to them.^{FN14}

^{FN13} It bears noting that [7 N.Y.C.R.R. § 701.3\(k\)\(2\)](#) was amended on June 13, 2006, so as to make it easier for an inmate to file a grievance from another facility. See [7 N.Y.C.R.R. § 701.6\(h\)](#) (providing that “[a]n inmate transferred to another facility may continue an appeal of any grievance,” and providing specific instructions on how to do so).

Here, the relevant time period is before June 13, 2006.

^{FN14} See [Finger v. Superintendent McFinnis](#), 99–CV–9870, 2004 WL 1367506, at *4 (S.D.N.Y. June 16, 2004) (“Plaintiff's perception of the unavailability of grievance procedures following transfer from a facility in which an incident occurred is inconsistent with the DOCS regulations, which provide that “[a]n institutional grievance brought by an inmate who was transferred, released, or paroled must be investigated and brought to an [Inmate Grievance Review Committee (IGRC)] hearing” at the complainant's original facility. [7 N.Y.C.R.R. § 701.3\(k\)\(2\)](#). Thus, removal from the facility where the alleged assault took place does not render grievance procedures unavailable.”); accord, [Carini v. Austin](#), 06–CV–5652, 2008 WL 151555, at *4 (S.D.N.Y. Jan. 14, 2008 (holding inmate's transfer from one DOCS facility to another in 2003 did not preclude him from filing a grievance at the original facility); [Sims v. Blot](#), 00–CV–2524, 2003 WL 21738766, at *4 (S.D.N.Y. July 25, 2003) (“The fact that plaintiff was moved from Sing Sing to the Auburn Correctional Facility does not, however, relieve him of the obligation to exhaust his administrative remedies in the facility where the incident occurred.”); [Santiago v. Meinsen](#), 89 F. Supp. 2d 435, 440–41 (S.D.N.Y. 2000) (holding inmate's transfer from one DOCS facility to another in does not relieve him from his duty to file a grievance at the original facility).

In any event, and more important, where, as here, the assault was of a sexual nature, the grievance would have been deemed to be a harassment grievance, and would have been forwarded directly and promptly to the superintendent. (Hrg. Transcript at 11, 18, 20–21, 26, 29, 40–41, 48, 64, 74–75; Hrg. Ex. D–2E.)

B. Estoppel

With regard to part two of the Second Circuit's three-part exhaustion inquiry, the Court finds, after carefully considering the matter, that Defendants did

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

nothing to estop themselves from asserting the affirmative defense of failure to exhaust administrative remedies.^{[FN15](#)}

[FN15](#). Generally, a defendant in an action may not be estopped from asserting the affirmative defense of failure to exhaust administrative remedies based on the actions (or inactions) of other individuals. [Murray, 2010 WL 1235591, at *5 & n. 26](#) [collecting cases].

While Plaintiff testified that he was scared following the alleged assault, the Court does not find that testimony credible. Even if the Court were to find that testimony credible, the Court would find that Plaintiff did not credibly testify-or indeed any way testify-that Defendants actually said anything to make him scared. The Court bases this finding on the following: (1) Plaintiff's criminal history as a sex offender and disciplinary history; (2) the fact that he purportedly tried to submit a grievance and two letters of complaint (one to the Superintendent and the other to OMH Unit Chief Maureen Bosco) a mere two days after the alleged assault; (3) the fact that he succeeded in hand-delivering a letter of complaint to OMH Social Worker Todd Asselin, for hand-delivery to Maureen Bosco, a mere three days after the alleged assault; and (4) the nature of Plaintiff's hearing testimony and his demeanor during that testimony. (Hrg. Transcript at 99-100, 106-121; Hrg. Exs. D-6E, D-10E, D-11E.)

*8 Similarly, while Plaintiff testified that his free flow of mail was interfered with during the two days following the alleged assault, the Court does not find that testimony credible. Even if the Court were to find that testimony credible, the Court would find that Plaintiff did not credibly testify-or indeed any way testify-that Defendants did anything to interfere with that mail. The Court bases this finding on the following: (1) the conspicuous absence of copies of the three pieces of mail in the record, (2) the hearing testimony, and investigative file, of IG Investigator Anthony Misercola; and (3) the nature of Plaintiff's hearing testimony and his demeanor during that testimony. (Hrg. Transcript at 88-121; Hrg. Exs. D-7E, D-10E.)

Finally, even if the Court were to find that Plaintiff was effectively prevented by Defendants from filing a grievance while he was at Clinton C.F., the Court would

find that he was not prevented by Defendants (or anyone) from filing that grievance (or pursuing the appeal process) once he was transferred from Clinton C.F. The Court bases this finding on the following: (1) the hearing testimony of Grievance Sergeant Scott McClean; (2) the hearing testimony of Inmate Grievance Program Director Karen Bellamy; (3) the nature of Plaintiff's hearing testimony and his demeanor during that testimony; and (4) the version of DOCs Directive 4040 in effect during the time in question. (Hrg. Transcript at 2-34, 58-88, 106-121; Hrg. Ex. D-2E.) *See also* Part III.A. of this Decision and Order.

C. Special Circumstances

With regard to part three of the Second Circuit's three-part exhaustion inquiry, as stated above in Part I of this Decision and Order, liberally construed, Plaintiff's pre-trial brief and hearing summation argue that the special circumstances consist of a combination of some or all of the following six circumstances: (1) the purported fact that (due to fear of reprisal) his speech was chilled, or at least he was hopelessly distracted, while he was at Clinton C.F. following the alleged assault; (2) the purported fact that his mail was interfered during the two days following the alleged assault; (3) the purported fact that, procedurally, he could not file a formal grievance at Clinton C.F. after he was transferred from there; (4) the fact that his hand-delivered letter to Maureen Bosco, which was brought to the attention of Clinton C.F. Deputy Superintendent of Security Jeff Tedford and referred by him to the IG, was effectively treated as a harassment grievance; (5) the purported fact that an appeal to CORC would have been futile under the circumstances because CORC would merely have "rubber stamp[ed]" the IG's conclusion that Plaintiff's claims were unsubstantiated; and (6) the purported fact that the IG investigation achieved the same purpose as pursuing the grievance process. (*See generally* Dkt. No. 68; Hrg. Transcript, at 129-131.) After carefully considering the matter, the Court rejects those circumstances (as grounds to excuse the exhaustion requirement), both individually and in their totality.

1. First, Second and Third Circumstances Asserted by Plaintiff

*9 With regard to the first two circumstances asserted by Plaintiff, the Court rejects those circumstances (as

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

grounds to excuse the exhaustion requirement) for the reasons stated above in Part III.B. of this Decision and Order. With regard to the third circumstance, the Court rejects that circumstance (as a ground to excuse the exhaustion requirement) for the reasons stated above in Part III.A. of this Decision and Order.

2. Fourth Circumstance Asserted by Plaintiff

With regard to the fourth circumstance asserted by Plaintiff (i.e., that his hand-delivered letter to Maureen Bosco, which was brought to the attention of Deputy Superintendent of Security Tedford and referred by him to the IG, was effectively treated as a harassment grievance), at the end of the exhaustion hearing the Court indicated that it was preliminarily finding that it agreed with Plaintiff that the letter was effectively a harassment grievance. However, after carefully reconsidering the matter, the Court now disagrees with Plaintiff.

[Section 701.8\(d\)](#) of Directive 4040 expressly states that the request for an IG investigation (of a bona fide harassment issue) must directly come from “the superintendent.” To liberally construe that term as meaning “the superintendent or his/her designee,” would be to blatantly ignore the fact the preceding subsection, [Section 701.8\(c\)](#), intentionally uses the term “the superintendent or his/her designee,” rendering that term's absence from [Section 701.8\(d\)](#) conspicuous. While the Court has not found any case law discussing the rationale for limiting the referral power to the superintendent, the Court imagines the rationale has to do with (1) the fact the time and expense of an IG investigation is not something that should be requested casually, and (2) the fact that limitation ensures that the superintendent has notice of the matter sufficient for him to render a decision to the grievant either before or after the IG investigation. This last fact is significant in this case, given that Legal Office Liaison Tammy Irwin testified that her review of Superintendent Artus' files revealed no indication that he knew of either Plaintiff's complaint or the referral *before* the referral occurred. (Hrg. Transcript at 51–58; *see* Hrg. Ex. P.9 at 55 [merely consisting of a fax from the IG to Superintendent Artus indicating that an interview would be conducted of Defs. Renadette but not stating Plaintiff's name and in any event being dated May 5, 2006, eleven days after the IG's investigation had begun].) This is not surprising because it appears that the referral to the IG came from Deputy Superintendent of Security Tedford,

not from Superintendent Artus. (Hrg. Transcript at 90–92; Hrg. Exs. P–9, P–13.) ^{FN16}

^{FN16} The Court rejects as incredible Plaintiff's claim that he sent a separate letter of complaint directly to Superintendent Artus, based on (1) Plaintiff's hearing testimony and demeanor during that testimony, and (2) the conspicuous absence of a copy of that letter in the record (despite Plaintiff's claim that he possesses it). (Hrg. Transcript at 117–121; *see* Hrg. Exs.) In any event, and more importantly, Plaintiff claims Superintendent Artus never received that letter. (Hrg. Transcript at 117–120.)

District courts appear to uniformly agree that, without a referral from a superintendent, an IG's investigation of a matter and conclusion that it is unsubstantiated does not satisfy the exhaustion requirement; rather, the inmate must still appeal the IG's conclusion of unsubstantiation to CORC.^{FN17} This is because Section 701.1(b) of the governing regulations explains that “[the inmate grievance] program is intended to supplement, not replace, existing formal or informal channels of problem resolution as set forth in [section 701.3\(a\)](#) of this Part.” [7 N.Y.C.R.R. § 701.1\(b\)](#).^{FN18} As a result, the Second Circuit has held that the “[r]esolution of a matter through informal channels satisfies the exhaustion requirement....” [Marvin v. Goord](#), [255 F.3d 40, 43 \(2d Cir.2001\)](#) (citing [7 N.Y.C.R.R. § 701.1](#)).^{FN19} District courts have interpreted this holding to mean that an inmate's efforts to resolve a matter through informal channels satisfies the exhaustion requirement only if the efforts resulted in the matter being concluded *in the inmate's favor*.^{FN20} Generally, those district courts reason that, when a matter has been concluded in the inmate's favor, it has been resolved (for purposes of his available exhaustion remedies), because nothing exists from which the inmate can appeal.^{FN21} Conversely, those district courts reason that, where informal efforts to resolve a matter have not resulted in the conclusion of the matter in the inmate's favor, the matter has not been resolved for purposes of his available exhaustion remedies, because he can still pursue the grievance process.^{FN22}

^{FN17} *See, e.g.,* [Stephenson v. Dunford](#), [320](#)

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

[F.Supp.2d 44, 46, 52 \(W.D.N.Y.2004\)](#) finding no exhaustion where inmate failed to pursue grievance all the way to CORC following investigation and finding of unsubstantiation by Inspector General), *vacated on other grounds*, [139 F. App'x 311 \(2d Cir.2005\)](#); [Johnson v. Fernandez](#), 09–CV–0626, 2011 WL 7629513, at *5 (N.D.N.Y. March 1, 2011) (Baxter, M.J.) (finding no exhaustion where inmate failed to pursue grievance all the way to CORC following investigation and finding of unsubstantiation by Inspector General), *adopted by* [2012 WL 1033652 \(N.D.N.Y. Mar 27, 2012\)](#) (Scullin, J.); [Jacoby v. Phelix](#), 07–CV–0872, 2010 WL 1839299, at *8–9 & n. 15 (N.D.N.Y. March 31, 2010) (Baxter, M.J.) (finding no exhaustion where inmate failed to pursue grievance all the way to CORC following investigation and finding of unsubstantiation by Inspector General), *adopted by* [2010 WL 1839264 \(N.D.N.Y. May 06, 2010\)](#) (Hurd, J.); [Thomas v. Cassleberry](#), 315 F.Supp.2d 301, 303–04 (W.D.N.Y.2004) (finding no exhaustion where inmate failed to pursue grievance all the way to CORC following “investig[ation] by [the] Inspector Gen[eral]”); [McNair v. Jones](#), 01–CV–3253, 2002 WL 31082948 at *4, 8 (S.D.N.Y. Sept. 18, 2002) (finding no exhaustion where inmate failed to pursue grievance all the way to CORC following investigation and finding of unsubstantiation by Inspector General); [Houze v. Segarra](#), 217 F.Supp.2d 394, 395–96 (S.D.N.Y.2002) (finding no exhaustion where inmate failed to pursue grievance all the way to CORC following IG's investigation and finding that there was “no merit to [the inmate's] allegations”); [Grey v. Spearhawk](#), 99–CV–9871, 2000 WL 815916, at *2 (S.D.N.Y. June 23, 2000) (rejecting inmate's argument that “the Inspector General's investigation, if any, into the matter exhausts the administrative procedures”); *cf.* [Tapp v. Kitchen](#), 02–CV–6658, 2004 WL 2403827, at *8 (W.D.N.Y. Oct. 26, 2004) (“Plaintiff's argument in this regard is further undercut by the fact that he never followed up on his complaint to the Inspector General after he

failed to receive any kind of a decision.”); [Velez v. Kulhmann](#), 02–CV–6062, 2003 WL 22004899, at *3 (S.D.N.Y. Aug. 22, 2003) (finding no exhaustion where inmate failed to pursue grievance all the way to CORC following his complaint to an IG investigator).

[FN18. Section 701.3\(a\)](#) provides that “[a]n inmate is encouraged to resolve his/her complaints through the guidance and counseling unit, the program area directly affected, or other existing channels (informal or formal) prior to submitting a grievance.” [7 N.Y.C.R.R. § 701.3\(a\)](#).

[FN19. Accord, Perez v. Blot](#), 195 F.Supp.2d 539, 545–46 (S.D.N.Y. 2002) (“As in Marvin, the Plaintiff here also contends that he successfully obtained as favorable a resolution to his grievance as possible after he complained about the assault to ‘correctional officials.’ ... If the discovery requested in this instance ultimately supports Plaintiff's allegations, he may be able to establish that he resolved his grievance through precisely the type of informal channels which are permitted under both Marvin and the New York administrative scheme.”).

[FN20. See, e.g., Thomas v. Cassleberry](#), 315 F.Supp.2d 301, 304 (W.D.N.Y.2004) (“Both *Perez* and *Marvin*, then, merely stand for the proposition that a grievance through informal channels satisfies the exhaustion requirement if the prisoner thereby obtained a favorable resolution of his grievance.”) (internal quotation marks omitted); [Muhammad v. Pico](#), 02–CV–1052, 2003 WL 21792158, at *8, n. 23 (S.D.N.Y. Aug. 5, 2003) (“Here, there is no evidence in the record that Muhammad's informal complaints resolved matters in his favor, and so *Marvin* is inapplicable.”); [Nelson v. Rodas](#), 01–CV–7887, 2002 WL 31075804, at *3 n. 9 (S.D.N.Y. Sept. 17, 2002) (“Contrary to the dicta in *Perez v. Blot*, 195 F.Supp.2d 539, 544–46 (S.D.N.Y.2002), this Court construes *Marvin v. Goord*, 255 F.3d 40, 43 n. 3 (2d

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

[Cir.2001](#)), as holding merely that a grievance through informal channels satisfies the exhaustion requirement if the prisoner thereby obtained a favorable resolution of his grievance.”).

[FN21. *Abney v. McGinnis*, 380 F.3d 663, 229 \(2d Cir.2004\); *Andrews v. Cruz*, 2010 WL 1141182, at *6 \(S.D.N.Y. Mar. 24, 2010\).](#)

[FN22. See 7 N.Y.C.R.R. § 701.3\(a\)](#) (“An inmate is encouraged to resolve his/her complaints through the guidance and counseling unit, the program area directly affected, or other existing channels (informal or formal) *prior to submitting a grievance.*”) (emphasis added); cf. [See *Percinthe v. Julien*, 08-CV-0893, 2009 WL 2223070, at *2 \(S.D.N.Y. July 24, 2009\)](#) (indicating that inmate filed appeal to CORC following a finding of unsubstantiation by IG); [Ortiz v. Skinner](#), 00-CV-07220, 2004 WL 2091994, at *1-2 (W.D.N.Y. Sept. 16, 2004) (“Director Eagen explains that ‘if an inmate or someone on the inmate’s behalf complains to the Office of the Inspector General, but the inmate does not file a grievance, the matter is never filed as a grievance and it cannot be appealed to CORC. Of course, the inmate can do both. However, if the inmate chooses to submit a complaint to the Office of the Inspector General and not to file a grievance, then the procedures set forth in Part 701 of Title 7 NYCRR and Directive # 4040 have been completely bypassed, and the inmate has not availed himself or herself of the IGP.’”).

*10 In any event, even if the letter was effectively a harassment grievance (that reached Superintendent Artus), that fact would not serve as a special circumstance justifying Plaintiff’s failure to exhaust his available administrative remedies, because (following a denial of, or nonresponse to, that harassment grievance) an appeal to CORC was still possible. See, *supra*, Part II of this Decision and Order. (See also Hrg. Transcript at 31-32, 75-77, 83-85).^{[FN23](#)}

[FN23. See also *Amador v. Andrews*, 655 F.3d 89, 103 \(2d Cir.2011\)](#) (stating that inmate was able to file appeal to CORC following his receipt of a superintendent’s response that he was forwarding of the grievance to IG for investigation); [Percinthe](#), 2009 WL 2223070, at *2 (indicating that inmate was able to file appeal to CORC following a finding of unsubstantiation by IG, after “[t]he Inmate Grievance Program reported the incident to the Inspector General’s office for investigation”).

Granted, some disagreement exists whether a harassment grievant must appeal to CORC where the IG’s finding of unsubstantiation *follows a referral by a superintendent*. Some cases reason that, because a superintendent’s referral to the IG must be preceded by a finding that *if true* the grievance would represent bona fide case of harassment, when such a referral occurs the grievant has received at least “partial favorable relief.” ^{[FN24](#)} However, these cases inexplicably ignore the fact that the IG has subsequently found that the grievance is *not true*. It is difficult to understand how a plaintiff can be found to have received “partial favorable relief” in a case based on his mere statement of an actionable claim, where that claim has been dismissed for lack of evidence. Not surprisingly, the Second Circuit has expressly recognized that a superintendent has neither granted nor denied a grievance where he has simply forwarded it to the Inspector General’s office for investigation. [Amador v. Andrews](#), 655 F.3d 89, 103 (2d Cir.2011) (“On July 11, 2003, the superintendent responded, neither granting nor denying the grievance, stating only, ‘Your grievance has been forwarded to the Inspector General’s office for further investigation.’”).

[FN24. See, e.g., *Andrews v. Cruz*, 04-CV-0566, 2010 WL 1142010, at *4-5 \(S.D.N.Y. March 9, 2010\); *Pagan v. Brown*, 08-CV-0724, 2009 WL 2581572, at *7-8 \(N.D.N.Y. Aug. 19, 2009\)](#) (Kahn, J., adopting Report-Recommendation of DiBianco, M.J.); [Lawyer v. Gatto](#), 03-CV7577, 2007 WL 549440, at *8 (S.D.N.Y. Feb. 21, 2007); [Hairston v. LaMarche](#), 05-CV-6642, 2006 WL 2309592, at *9 (S.D.N.Y. Aug. 10, 2006).

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

After carefully reviewing the relevant case law, the Court finds that the better-reasoned cases answer this question in the affirmative: a harassment grievant must appeal to CORC even where the IG's finding of unsubstantiation follows a referral by a superintendent. *See, e.g., Torres v. Carry*, 672 F.Supp.2d 338, 343–44 (S.D.N.Y.2009) (finding no exhaustion where [1] inmate received response from superintendent informing him that the Inspector General's Office was investigating the matter, [2] he subsequently received neither an investigative report from the Inspector General's Office nor a further response from the superintendent, and [3] he never completed the exhaustion process by receiving a response from CORC, as required by the regulations); *see also, supra*, note 17 of this Decision and Order. This conclusion is also supported by the hearing testimony adduced in this case. (Hrg. Transcript at 31–32, 75–77, 83–85.)

Here, Plaintiff never filed any such appeal, either after any referral to the IG or after the conclusion of the IG's investigation. *See, supra*, note 9 and accompanying analysis in Part III of this Decision and Order. (*See also* Hrg. Transcript at 67–71; Hrg. Ex. D–4E.) It is important to note that Plaintiff received notice of the conclusion of the IG's investigation. (Hrg. Transcript at 114.)

*11 For all of these reasons, the Court rejects (as a ground to excuse the exhaustion requirement) the fourth circumstance relied on by Plaintiff.

3. Fifth Circumstance Asserted by Plaintiff

With regard to the fifth circumstance asserted by Plaintiff (i.e., the purported fact that an appeal to CORC would have been futile under the circumstances because CORC would merely have “rubber stamped” the IG's conclusion that Plaintiff's claims were unsubstantiated), the Court finds that it would *not* have been futile to file an appeal with CORC under the circumstances. The Court bases this finding on the following: (1) the hearing testimony of Inmate Grievance Program Director Karen Bellamy; (2) the version of DOCs Directive 4040 in effect during the time in question; and (3) cases requiring an appeal to CORC following an conclusion of

unsubstantiation by the IG. (Hrg. Transcript at 58–88; Hrg. Ex. D–2E .) *See also, supra*, Part III.C.2. of this Decision and Order.

Granted, at the hearing, Inmate Grievance Program Director Bellamy testified that, if a complaint is found by the IG to be unsubstantiated, then “we kind of ... go with that” on appeal. (Hrg. Transcript at 77.) However, taken in its totality her hearing testimony explains as follows: (1) the coordinators in her office at CORC only “*probably* go down to the IG's office” and get information that they “go with”; (2) whether they “go with” the results of the IG's investigation “*depends*”; and (3) even if they “go with” the results of the IG's investigation, a separate investigation may still be conducted. (Hrg. Transcript at 77, 87 [emphasis added].) This is not surprising given that it strains credulity to believe that, if an IG report were perceived to be deficient by CORC, the inmate's appeal would perfunctorily be denied. Indeed, the added layer of review by CORC is the very reason cases hold that, following an conclusion of unsubstantiation by the IG, an appeal to CORC is required in order to exhaust. *See, supra*, Part III.C.2. of this Decision and Order (citing cases). In short, the authority of CORC to depart from the result of an IG investigation is the very thing that requires Plaintiff to appeal to CORC to complete the exhaustion process.

It is important to note that district courts have rather uniformly rejected arguments, and even testimony, that he need not have filed an appeal to CORC because doing so would have been futile. *See, e.g., White v. Ercole*, 06–CV–11361, 2009 WL 602890, at *2, 4 (S.D.N.Y. March 3, 2009) (rejecting as unpersuasive inmate's affirmation swearing that an appeal to CORC would have been futile); *Rodriguez v. Goord*, 05–CV–6131, 2008 WL 495514, at *4, 6 (W.D.N.Y. Feb. 21, 2008) (rejecting inmate's argument that an appeal to CORC would have been futile); *Muniz v. Goord*, 04–CV–0479, 2007 WL 2027912, at *3, 5 (N.D.N.Y. July 11, 2007) (McAvoy, J.) (rejecting inmate's argument that an appeal to CORC would have been futile); *Hill v. Chalanor*, 419 F.Supp.2d 255, 259 (N.D.N.Y. March 8, 2006) (Kahn, J.) (“If Plaintiff chooses to pursue said appeal to the CORC, he should be sure to contact whatever prison officials he must, and comply with all appeal procedures. Plaintiff must exhaust all available administrative remedies, even

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

is such exhaustion would result in futility or ineffectiveness.”); [Morrow v. Goord](#), 03–CV–0713, 2005 WL 1159424, at *3 (W.D.N.Y. May 17, 2005) (“Morrow argues that it would be futile to exhaust his administrative remedy because CORC has already reviewed a similar grievance and that its decision is not likely to change. Futility, however, is not an exception to the PLRA’s exhaustion requirement.”); [Wagnoon v. Johnson](#), 02–CV–10282, 2004 WL 583764, at *3 (S.D.N.Y. March 23, 2004) (“Plaintiff’s apparent belief that the required appeal to CORC would ultimately be fruitless is insufficient to excuse nonexhaustion. Exhaustion of administrative remedies is required even if an inmate believes that such exhaustion would be futile.”).^{FN25} As United States District Judge Thomas J. McAvoy of this District explained in *Muniz v. Goord*,

^{FN25}. Cf. [Davidson v. Talbot](#), 01–CV–0473, 2005 WL 928620, at *8 (N.D.N.Y. Mar. 31, 2005) (Treece, M.J.) (“Exhaustion is similarly required even if the prisoner asserts futility as an excuse.”), [adopted by](#) 2006 WL 1877144 (N.D.N.Y. Jul 5, 2006) (Scullin, J.); [Williams v. Comstock](#), 03–CV–0782, 2004 WL 2646544, *2 (W.D.N.Y. Nov. 18, 2004) (“In the Second Circuit, formal compliance with the IGP is required and an inmate must exhaust his administrative remedies even if such exhaustion would be futile or ineffective.”); [Arce v. Keane](#), 01–CV–2648, 2004 WL 439428, at *5 (S.D.N.Y. March 9, 2004) (“[F]utility will not excuse an inmate’s failure to exhaust his administrative remedies.”); [Petit v. Bender](#), 99–CV–0969, 2003 WL 22743485, at *5 (S.D.N.Y. Nov. 19, 2003) (“In the Second Circuit, formal compliance with the Inmate Grievance Program is required and an inmate must exhaust his administrative remedies even if such exhaustion would be futile or ineffective.”).

*12 [In making his futility argument] Plaintiff confuses a prisoner’s ability to appeal to CORC with a prisoner’s chances of success during such an appeal. Simply because a prisoner might not stand a realistic chance of success during an appeal does not mean that the administrative appellate process is not ‘available’ to the

prisoner. (If so, then any prisoner with an unmeritorious or frivolous claim would not have the administrative appellate process ‘available’ to him.)

[Muniz](#), 2007 WL 2027912, at *5.

It is also important to note that, despite Plaintiff’s argument, absolutely no hearing testimony or exhibits were adduced establishing that futility was why he did not appeal to CORC. (See Hrg. Transcript, at 2–121; Hrg. Exs.)

For all of these reasons, the Court rejects (as a ground to excuse the exhaustion requirement) the fifth circumstance relied on by Plaintiff.

4. Sixth Circumstance Asserted by Plaintiff

With regard to the sixth circumstance asserted on by Plaintiff (i.e., the purported fact that the IG investigation served the same purpose as the grievance process), based on the hearing testimony exhibits, the Court finds that (1) as an initial matter, the purpose of the IG investigation was materially different from the purpose of the grievance process (2) even if the two purposes were the same, that fact does not excuse a failure to exhaust. The Court bases this finding on the following: (1) the hearing testimony of Inmate Grievance Program Director Karen Bellamy; (2) the hearing testimony of IG Senior Investigator Anthony Misercola; (3) the letter of complaint written by Plaintiff to OMH Unit Chief Maureen Bosco; (4) the investigative file of IG Senior Investigator Anthony Misercola; (5) the version of DOCs Directive 4040 in effect during the time in question; (6) cases requiring an appeal to CORC following an conclusion of unsubstantiation by the IG; and (7) cases finding that futility does not relieve an inmate of the duty to appeal to CORC. (Hrg. Transcript at 58–105; Hrg. Exs. D–2E, D–6E, D–10E.) See also, *supra*, Parts III.C.2. and III.C.3. of this Decision and Order.

Based on the record evidence, it appears that, with regard to harassment grievances, the focus of an IG investigation is on ascertaining the wrongdoing of a correctional employee for purposes of *discipline*, while the focus of the grievance process is to provide an inmate a method for *resolving* allegations of employee misconduct meant to annoy, intimidate or harm an inmate. (Hrg. Transcript at 25, 29–30, 103; Hrg. Exs. D–2E, D–10E.) Simply stated, the purpose of the former is to determine

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

(Cite as: 2012 WL 4449937 (N.D.N.Y.))

whether to discipline an employee, while the purpose of the latter is to determine whether to give relief to an inmate. (*Id.*) Indeed, when asked to compare the two things, Grievance Sergeant Scott McLean testified credibly that an “IG’s investigation would have nothing to do with mine”; similarly, Senior Investigator Anthony Misercola testified credibly that “[m]y purview is sex crimes investigation. What they do in grievance is separate from me.... My investigations have nothing to do with the grievance—they’re two totally separate processes.... I’ve never been contacted by CORC regarding an appeal. They don’t have purview over my investigations.” (Hrg. Transcript at 25, 102–103, 105.) This appears to be the case here, where the relief requested in Plaintiff’s grievance was essentially to ensure that he would be kept apart from Defendants for the remainder of his incarceration at DOCCS, not the disciplining of Defendants. (Hrg.Ex.D–6E.)

*13 In any event, even if the IG investigation served the same purpose as the grievance process, that fact would not relieve Plaintiff of the duty to file an appeal with CORC. In addition to flying in the face of the plain language of DOCCs Directive 4040 and the hearing testimony of Scott McClean and Karen Bellamy, a contrary rule would undermine the cases holding that, following an conclusion of unsubstantiation by the IG, an appeal to CORC is required in order to exhaust. *See, supra*, Part III.C.2. of this Decision and Order (citing cases). A contrary rule would also undermine the cases holding that futility or ineffectiveness is not a ground for relieving an inmate of filing an appeal to CORC. *See, supra*, Part III.C.4. of this Decision and Order.

For all of these reasons, the Court rejects (as a ground to excuse the exhaustion requirement) the sixth circumstance relied on by Plaintiff.

ACCORDINGLY, it is

ORDERED that Plaintiff’s Complaint (Dkt. No. 1) is **DISMISSED** in its entirety **without prejudice** for failure to exhaust his available administrative remedies before filing this action, pursuant to the PLRA; and it is further

ORDERED that the Clerk of the Court shall enter

judgment for Defendants and close the file in this action.

N.D.N.Y.,2012.

Goodson v. Silver

Slip Copy, 2012 WL 4449937 (N.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
N.D. New York.
LaCream NEWMAN, Plaintiff,
v.
George B. DUNCAN, Superintendent of Great Meadow
Correctional Facility; David Carpenter, Deputy
Superintendent; Patrick Vanguilder, Deputy
Superintendent of Security; William Mazzuca,
Superintendent of Fishkill Correctional Facility; R.
Ercole, Deputy Superintendent of Security; J. Conklin,
Corrections Sergeant; and John Doe, Corrections
Officer, Defendants.
No. 04-CV-395 (TJM/DRH).

Sept. 26, 2007.

LaCream Newman, Auburn, NY, pro se.

Hon. [Andrew M. Cuomo](#), Attorney General for the State
of New York, [Charles J. Quackenbush, Esq.](#), Assistant
Attorney General, of Counsel, Albany, NY, for
Defendants.

DECISION & ORDER

[THOMAS J. McAVOY](#), Senior United States District
Judge.

I. INTRODUCTION

*1 This *pro se* action brought pursuant to [42 U.S.C. § 1983](#) was referred to the Hon. David R. Homer, United States Magistrate Judge, for a Report and Recommendation pursuant to [28 U.S.C. § 636\(b\)](#) and Local Rule 72.3(c). No objections to the

Report-Recommendation and Order dated September 6, 2007 have been filed. Furthermore, after examining the record, this Court has determined that the Report-Recommendation and Order is not subject to attack for plain error or manifest injustice. Accordingly, the Court adopts the Report-Recommendation and Order for the reasons stated therein.

It is therefore,

ORDERED that

(1) Defendants' motion for summary judgment (Docket No. 36) is **GRANTED** as to defendants Duncan, Carpenter, VanGuilder, Mazzuca, Ercole, and Conklin and as to all of Newman's causes of action;

(2) The complaint is **DISMISSED** without prejudice as to defendant John Doe; and

(3) This action is **TERMINATED** in its entirety as to all defendants and all claims.

IT IS SO ORDERED

REPORT-RECOMMENDATION AND ORDER^{FN1}

^{FN1} This matter was referred to the undersigned for report and recommendation pursuant to [28 U.S.C. § 636\(b\)](#) and N.D.N.Y.L.R. 72.3(c).
[DAVID R. HOMER](#), U.S. Magistrate Judge.

Plaintiff *pro se* LaCream Newman ("Newman"), an inmate in the custody of the New York State Department of Correctional Services ("DOCS"), brings this action pursuant to [42 U.S.C. § 1983](#) alleging that defendants, seven DOCS employees, violated his constitutional rights under the Eighth and Fourteenth Amendments. ^{FN2} See Compl. (Docket No. 1). Presently pending is defendants'

Not Reported in F.Supp.2d, 2007 WL 2847304 (N.D.N.Y.)
(Cite as: 2007 WL 2847304 (N.D.N.Y.))

motion for summary judgment pursuant to [Fed.R.Civ.P. 56](#), Docket No. 36. Newman opposes the motion. Docket No. 41. For the following reasons, it is recommended that defendants' motion be granted.

[FN2](#). Newman's Fourteenth Amendment claims were previously dismissed. *See* Docket No. 28.

I. Background

The facts are presented in the light most favorable to Newman as the non-moving party. *See* [Ertman v. United States](#), 165 F.3d 204, 206 (2d Cir.1999).

On October 23, 2002, Newman was being transferred from Great Meadow Correctional Facility ("Great Meadow") to Fishkill Correctional Facility's ("Fishkill") Special Housing Unit ("SHU").^{[FN3](#)} *See* Pelc. Aff. (Docket No. 36), Ex. B. Before arriving at Fishkill, Newman was temporarily housed at Downstate Correctional Facility ("Downstate"). *Id.* While being housed at Downstate, an inmate attempted to sexually assault Newman. *See* Compl. at ¶ 7. On October 24, 2002, Newman was transferred from Downstate to Fishkill. *See* Pelc. Aff., Ex. B. Upon arrival at Fishkill, Newman was assigned to a double occupancy cell. *See* Compl. at ¶ 10. On October 29, 2002, an inmate again attempted to sexually assault Newman. *See* Compl. at ¶ 12; *see also* Harris Aff. (Docket No. 36) at Ex. A. On November 15, 2002, Newman was transferred to Clinton Correctional Facility ("Clinton"). *See* Pelc. Aff., Ex. B. This action followed.

[FN3](#). SHUs exist in all maximum and certain medium security facilities. The units "consist of single-or double-occupancy cells grouped so as to provide separation from the general population" [N.Y. Comp.Codes R. & Regs. tit. 7, § 300.2\(b\) \(2004\)](#). Inmates are confined in a SHU as discipline, pending resolution of misconduct charges, for administrative or security reasons, or in other circumstances as required. *Id.* at pt. 301.

II. Discussion

Newman asserts six causes of action, each alleging that defendants' failure to house Newman in a single occupancy cell constituted cruel and unusual punishment under the Eighth Amendment. Defendants seek judgment on all claims.

A. Standard

*2 A motion for summary judgment may be granted if there is no genuine issue as to any material fact if supported by affidavits or other suitable evidence and the moving party is entitled to judgment as a matter of law. The moving party has the burden to show the absence of disputed material facts by informing the court of portions of pleadings, depositions, and affidavits which support the motion. [Fed.R.Civ.P. 56\(c\)](#); [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323 (1986). Facts are material if they may affect the outcome of the case as determined by substantive law. [Anderson v. Liberty Lobby](#), 477 U.S. 242, 248 (1986). All ambiguities are resolved and all reasonable inferences are drawn in favor of the non-moving party. [Skubel v. Fuoroli](#), 113 F.3d 330, 334 (2d Cir.1997).

The party opposing the motion must set forth facts showing that there is a genuine issue for trial. The non-moving party must do more than merely show that there is some doubt or speculation as to the true nature of the facts. [Matsushita Elec. Indus. Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 586 (1986). It must be apparent that no rational finder of fact could find in favor of the non-moving party for a court to grant a motion for summary judgment. [Gallo v. Prudential Residential Servs.](#), 22 F.3d 1219, 1223-24 (2d Cir.1994); [Graham v. Lewinski](#), 848 F.2d 342, 344 (2d Cir.1988). When, as here, a party seeks summary judgment against a pro se litigant, a court must afford the non-movant special solicitude. *Id.*; *see also* [Triestman v. Fed. Bureau of Prisons](#), 470 F.3d 471, 477 (2d Cir.2006). However, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. [Anderson](#), 477 U.S. at 247-48.

Not Reported in F.Supp.2d, 2007 WL 2847304 (N.D.N.Y.)
(Cite as: 2007 WL 2847304 (N.D.N.Y.))

B. Exhaustion

Defendants contend that Newman has failed to demonstrate any reasonable excuse for failing to exhaust his administrative remedies as to his Eighth Amendment claim. *See* Defs. Mem. of Law (Docket No. 36) at 6-11. Newman contends that he failed to exhaust his administrative remedies after the attempted sexual assaults because (1) he was threatened by John Doe; (2) he was in transit between DOCS facilities; and (3) he was dealing with the mental and emotional effects of the attempted assaults. *See* Pl. Reply Mem. of Law (Docket No. 41) at 1-3.

The Prison Litigation Reform Act ("PLRA"), [42 U.S.C. § 1997e\(a\)](#), subjects suits concerning prison conditions brought under federal law to certain prerequisites. Specifically, the PLRA dictates that a prisoner confined to any jail, prison, or correctional facility must exhaust all available administrative remedies prior to bringing any suit concerning prison life, "whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Ziemba v. Wezner*, 366 F.3d 161, 163 (2d Cir.2004) (quoting *Porter v. Nussle*, 534 U.S. 516, 532 (2002)); *see also Jones v. Bock*, 127 S.Ct. 910, 918-19 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.") (citation omitted); *Woodford v. Ngo*, 126 S.Ct. 2378, 2382-83 (2006). Administrative remedies include all appellate remedies provided within the system, not just those that meet federal standards. *Woodford*, 126 S.Ct. at 2382-83. However, the Second Circuit has recognized three exceptions to the PLRA's exhaustion requirement:

^{FN4} It is unclear whether *Woodford* has overruled the Second Circuit's exceptions to the exhaustion requirement. *See Miller v. Covey*, No. Civ. 05-649 (LEK/GJD), 2007 WL 952054, at *3-4 (N.D.N.Y. Mar. 29, 2007). However, it is not necessary to determine what effect *Woodford* has on the Second Circuit's exceptions to the exhaustion requirement because Newman's contentions cannot prevail even under pre-*Woodford* case law. *See Ruggiero v. County of Orange*, 467 F.3d 170, 176 (2d Cir.2006)

*3 when (1) administrative remedies are not available to the prisoner; (2) defendants have either waived the defense of failure to exhaust or acted in such a way as to estop them from raising the defense; or (3) special circumstances, such as a reasonable misunderstanding of the grievance procedures, justify the prisoner's failure to comply with the exhaustion requirement.

Ruggiero, 467 F.3d at 175 (citing *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir.2004))

"The PLRA's exhaustion requirement is designed to 'afford [] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.' " *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir.2004) (quoting *Porter*, 534 U.S. at 524-25)). "[A] grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." *Id.* (quoting *Strong v. David*, 297 F.3d 646, 650 (7th Cir.2002)). Inmates must provide sufficient information to "allow prison officials to take appropriate responsive measures." *Id.*

DOCS has established a grievance procedure which includes a three-stage review and appeal process. *See N.Y. Correct. Law § 139* (McKinney 2003); *N.Y. Comp. Codes R. & Regs. tit. 7, § 701.1-.16* (2003); ^{FN5} *Hemphill*, 380 F.3d at 682-83. When an inmate files a grievance, it is investigated and reviewed by an Inmate Grievance Resolution Committee ("IGRC"). If the grievance cannot be resolved informally, a hearing is held. The IGRC decision may be appealed to the Superintendent of the facility. Finally, an inmate may appeal the Superintendent's decision to the Central Office Review Committee ("CORC"). *N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7(c)*.

^{FN5} The Court is aware that the sections governing the Inmate Grievance Program procedures in the Official Compilation of Codes, Rules & Regulations of the State of New York were re-numbered in June 2006. *See Bell v. Beebe*, No. Civ. 06-544 (NAM/GLD), 2007 WL 1879767, at *3 n. 4 (N.D.N.Y. June 29, 2007). However, in the interests of clarity, the Court will cite the section numbers of the provisions

Not Reported in F.Supp.2d, 2007 WL 2847304 (N.D.N.Y.)
(Cite as: 2007 WL 2847304 (N.D.N.Y.))

that were in effect at the time Newman filed his complaint.

Here, it is undisputed that Newman's first attempt to file a grievance regarding the alleged sexual assaults did not occur until September 21, 2003, nearly one year after the alleged assaults. *See* Pl. Reply Statement of Material Facts (Docket No. 41) at Ex. 2; *see also* Newman Dep. (Ullman Decl. at Ex. 1, Docket No. 36) at 85-87. In his complaint, Newman contends that he failed to file a timely complaint due to "fear." *See* Pl. Reply Statement of Material Facts at Ex. 2. However, the Inmate Grievance Program ("IGP") supervisor at Clinton rejected Newman's attempt to file his complaint as a grievance because Newman failed to "expand on what/who caused the 'fear.'" *Id.* The IGP supervisor also noted that Newman had been housed at Clinton for the previous nine months and, thus, had "ample opportunity to file [his] complaint before [September 2003]." *Id.* Newman attempted to file an appeal of the IGP supervisor's decision to the Superintendent, but the supervisor advised Newman "[t]here is no provision to appeal the IGP Supervisors decision (to not accept a grievance) to the Superintendent. You may file a separate grievance on the determination by submitting it to the IGRC office." *Id.*

*4 On or about October 15, 2003, Newman filed a grievance requesting that the October 10, 2003 decision of the IGP supervisor be reversed. *See* Ullman Decl. (Docket No. 36) at Exs. 5 & 6. Newman alleged that the following "mitigating circumstances" prevented him from filing a timely grievance regarding the October 2002 sexual assaults: "1. I was in transit within the 14 days of the incident; to a number of correctional facilities; in addition to MHU within NYS DOCS; 2. I was confronted with fear (threats); which was made by CO's at Fishkill SHU 200 which I wasn't to make mention of the situation and that he could cause me to be placed in the same situation again and no on[e] would help me." *Id.* The IGRC denied Newman's grievance, finding that "[Newman] has been in [Clinton] since Dec. 2002 which gave him adequate time to file complaint which would have been accepted if filed then. Grievant did not provide mitigating circumstances to warrant the acceptance of complaint." Ullman Decl., Ex. 5 at 4. The Superintendent and CORC both denied Newman's appeals, finding that Newman had failed to present mitigating circumstances to excuse his delay in submitting the complaint. *See* Ullman Decl., Exs. 7 & 8.

In claiming that his non-exhaustion should be excused, Newman makes three arguments. First, he contends that a corrections officer at Fishkill (John Doe) threatened him, warning that if Newman reported the October 29, 2002 sexual assault then he would be placed back in the "same predicament" he was in before. *See* Newman Dep. at 83. However, Newman was transferred to Clinton in November 2002 and, thus, could have immediately filed a grievance now that he was separated from the officer who threatened him. *See* Pelc Decl. (Docket No. 36) at Ex. B. Further, Newman testified that he felt "safe" while at Clinton, demonstrating that any fear he may have had surrounding the filing of a grievance was left behind at Fishkill. *See* Newman Dep. at 66. Moreover, Newman ultimately did file a grievance while at Clinton. *See* Ullman Decl., Exs. 5 & 6. Thus, Newman's first argument for failure to properly exhaust is not persuasive.

Second, Newman contends that his frequent transfers between DOCS facilities within fourteen days of the sexual assaults prevented him from timely filing a grievance. However, this argument is not persuasive because DOCS regulations state that "[e]ach correctional facility housing a reception/classification/transit inmate population shall insure all inmates access to the IGP." [N.Y. Comp. Codes R. & Regs. tit.7, § 701.14](#). Further, Newman arrived at Clinton on November 15, 2003 and was not moved to another DOCS facility until November 19, 2003, thus affording him nearly a year where he was not "in transit." *See* Pelc. Decl. at Ex. B.

Third, Newman contends that this Court should apply the "special circumstances" exception under *Hemphill* because he was dealing with the mental and emotional effects of the sexual assaults, thus preventing his filing of a grievance. *See* Newman Dep. at 83-84; Pl. Reply Mem. of Law at 2-3; *see also* [Hemphill, 380 F.3d at 686](#). However, the special circumstances exception under *Hemphill* concerned an inmate's justifiable confusion regarding the proper DOCS procedure for filing an expedited grievance, not an inmate's mental or emotional condition. *See* [Hemphill, 380 F.3d at 689-91](#). Thus, absent any documented mental illness that prevented Newman from filing a grievance, his third argument excusing his failure to timely exhaust his administrative remedies is not persuasive.^{FN6}

Not Reported in F.Supp.2d, 2007 WL 2847304 (N.D.N.Y.)
(Cite as: 2007 WL 2847304 (N.D.N.Y.))

[FN6](#). Moreover, shortly after the second assault, Newman wrote a letter to his counselor requesting that he be able to correspond with another inmate. *See* Newman Dep. at 42-43. Thus, in light of his ability to correspond with his counselor shortly after the incident, Newman's contention that he was too emotionally distraught to file a grievance is without merit.

*5 Therefore, it is recommended that defendants' motion on this ground be granted.

C. Eighth Amendment [FN7](#)

[FN7](#). In his complaint, Newman contends that defendants' conduct constituted cruel and unusual punishment in violation of the Eighth Amendment because their failure to comply with DOCS regulations "facilitated ... the cause for the incident of attempted rape/physical assault that occurred to plaintiff therein at Fishkill SHU 200, on or about 10/29/02." Compl. at ¶¶ 15, 17, 19, 21, 23. Therefore, Newman's cause of action is best addressed under the Eighth Amendment's failure to protect standard.

Newman contends that defendants knew or should have known that he was a homosexual and that his placement in a double occupancy cell "facilitated ... the cause for the incident of attempted rape/physical assault that occurred to plaintiff therein at Fishkill SHU 200, on or about 10/29/02." Compl. at ¶¶ 15, 17, 19, 21, 23.

Prison officials have a duty to protect inmates from violence by other inmates. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994). When asserting a failure to protect claim, an inmate must establish that he was "incarcerated under conditions posing a substantial risk of serious harm" and that the defendants acted with deliberate indifference to the inmate's safety. *Id.* at 834. Deliberate indifference is established when the official knew of and disregarded an excessive risk to inmate health or safety. *Id.* at 837. However, "the issue is not whether [a plaintiff] identified

his enemies by name to prison officials, but whether they were aware of a substantial risk of harm to [him]." *Hayes v. New York City Dep't of Corr.*, 84 F.3d 614, 621 (2d Cir.1991).

Here, Newman contends that on two separate occasions, fellow inmates "attempted to rape/physical[ly] assault" him. *See* Compl. at ¶¶ 7, 11, 15, 17, 19, 21, 23. However, it is undisputed that Newman did not suffer any actual injury [FN8](#) from these attempted assaults. *See* Defs. Statement of Material Facts (Docket No. 36) at ¶¶ 71-76; Pl. Reply Statement of Facts at ¶¶ 71-76; *see also* Newman Dep. at 31-32, 35-37, 41-42, 68-74, 95-96; Harris Aff. at Ex. A. The law is clear that an inmate must demonstrate an "actual injury" when alleging a constitutional violation. *See Brown v. Sai*, No. Civ. 06-6272(DGL), 2007 WL 1063011, at *2 (W.D.N.Y. Apr. 5, 2007) (citing *Lewis v. Casey*, 518 U.S. 343, 349 (1996)). These two isolated incidents, coupled with Newman's failure to allege any injury resulting from the attempted sexual assaults, fail to demonstrate a constitutional violation under the Eighth Amendment. *See Boddie v. Schnieder*, 105 F.3d 857, 861-62 (2d Cir.1997) (holding that isolated incidents of sexual assault, without any injury, fail to state an Eighth Amendment claim); *see also Brown*, 2007 WL 1063011, at *2 (dismissing inmate's failure to protect claim for failure to demonstrate an actual injury).

[FN8](#). To the extent that Newman contends that the attempted assaults caused him any mental or emotional injury, this claim must fail because "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e) (2003); *see also Thompson v. Carter*, 284 F.3d 411, 417 (2d Cir.2002) (holding that § 1997e(e) "applies to claims in which a plaintiff alleges constitutional violations so that the plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury").

Therefore, in the alternative, it is recommended that

Not Reported in F.Supp.2d, 2007 WL 2847304 (N.D.N.Y.)
(Cite as: 2007 WL 2847304 (N.D.N.Y.))

defendants' motion on this ground be granted.

D. Qualified Immunity

Defendants also contend that they are entitled to qualified immunity. Qualified immunity generally protects governmental officials from civil liability insofar as their conduct does not violate clearly established constitutional law of which a reasonable person would have known. [*Harlow v. Fitzgerald*, 457 U.S. 800, 818 \(1982\)](#); [*Aiken v. Nixon*, 236 F.Supp.2d 211, 229 \(N.D.N.Y.2002\)](#), *aff'd*, 80 Fed.Appx. 146 (2d Cir. Nov. 10, 2003). A court must first determine that if plaintiff's allegations are accepted as true, there would be a constitutional violation. Only if there is a constitutional violation does a court proceed to determine whether the constitutional rights were clearly established at the time of the alleged violation. [*Aiken*, 236 F.Supp.2d at 230](#). Here, as discussed *supra*, accepting all of Newman's allegations as true, he has not shown that defendants violated his constitutional rights.

*6 Therefore, in the alternative, defendants' motion for summary judgment on this ground should be granted.

E. Failure to Serve Defendant John Doe

Newman's complaint asserts a claim against John Doe, a defendant who has neither been identified nor served with the complaint. [Rule 4\(m\) of the Federal Rules of Civil Procedure](#) requires that service of process be effectuated within 120 days of the date of the filing of the complaint. *See also* N.D.N.Y.L.R. 4.1(b). Because defendant John Doe has not been identified by Newman or timely served with process, it is recommended that the complaint be dismissed without prejudice against this defendant.

III. Conclusion ^{FN9}

^{FN9}. Defendants also contend that Newman failed to demonstrate that they were personally involved in the alleged constitutional violations. *See* Defs. Mem. of Law at 11-14. However, it is recommended herein that defendants' motion

should be granted as to all of Newman's claims on other grounds. Thus, this argument need not be addressed.

For the reasons stated above, it is hereby

RECOMMENDED that:

1. Defendants' motion for summary judgment (Docket No. 36) be **GRANTED** as to defendants Duncan, Carpenter, VanGuilder, Mazzuca, Ercole, and Conklin and as to all of Newman's causes of action;
2. The complaint be **DISMISSED** without prejudice as to defendant John Doe; and
3. This action therefore be **TERMINATED** in its entirety as to all defendants and all claims.

Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** [*Roldan v. Racette*, 984 F.2d 85, 89 \(2d Cir.1993\)](#); [*Small v. Sec'y of HHS*, 892 F.2d 15 \(2d Cir.1989\)](#); [28 U.S.C. § 636\(b\)\(1\)](#); [Fed.R.Civ.P. 72, 6\(a\), 6\(e\)](#).

N.D.N.Y., 2007.

Newman v. Duncan

Not Reported in F.Supp.2d, 2007 WL 2847304 (N.D.N.Y.)

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(Cite as: 2007 WL 389003 (E.D.N.Y.))

Background

C Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.
Wayne HARGROVE, Plaintiff,
v.
Sheriff Edward RILEY; Nassau County Correctional
Facility, et al; Nassau County University Medical Staff
and Nassau County Correctional Facility, Defendants.
Civil Action No. CV-04-4587 (DGT).

Jan. 31, 2007.

Wayne Hargrove, Ossining, NY, pro se.

[Alexander V. Sansone](#), Troy & Troy, Lake Ronkonkoma,
NY, [Joseph Carney](#), Mineola, NY, for Defendants.

MEMORANDUM AND ORDER

[TRAGER](#), J.

*1 Inmate Wayne Hargrove ("Hargrove" or "plaintiff") brings this *pro se* action pursuant to [42 U.S.C. § 1983](#) against the Nassau County Sheriff, Nassau County Correctional Facility ("NCCF") and NCCF's medical staff, (collectively, "defendants"), seeking damages for injuries allegedly caused by defendants while he was incarcerated at NCCF. Defendants now move for summary judgment pursuant to [Fed.R.Civ.P. 56](#) arguing, *inter alia*, that Hargrove's claims should be dismissed because he failed to exhaust administrative remedies, as required by the Prison Litigation Reform Act of 1995 ("PLRA"), [42 U.S.C. § 1997e](#). For the following reasons, defendants' motions for summary judgment are granted.

On August 27, 2004,^{[FN1](#)} Hargrove filed a complaint, alleging that defendants violated his civil rights when they forcibly administered purified protein derivative skin tests ("PPD test") to test for latent [tuberculosis](#) ("TB") in April 2002, 2003 and 2004 while he was incarcerated at NCCF. Complaint, Ex. C; Aff. in Opp. at 1-4, Ex. A. Hargrove named Nassau County Sheriff Edward Reilly ("Reilly"), NCCF and Nassau County University Medical Staff^{[FN2](#)} as defendants.^{[FN3](#)} On November 22, 2004, after discovery, County Defendants and NHCC Defendants filed separate motions for summary judgment pursuant to [Fed.R.Civ.P. 56](#). Both defendants properly filed a Local Rule 56.1 Statement and served Hargrove a Notice to *Pro Se* Litigant Opposing Motion for Summary Judgment, pursuant to [Local Civil Rule 56.2](#).

[FN1](#). Hargrove signed the complaint August 27, 2004. The *pro se* clerk's office received and filed the complaint on September 20, 2004. Under the prison mail-box rule, a *pro se* prisoner's complaint is deemed filed when it is delivered to prison authorities. See, e.g., [Walker v. Jastremski](#), 430 F.3d 560, 562 (2d Cir.2005)(deeming *pro se* prisoner's [§ 1983](#) action filed on date complaint was handed to prison officials). There is no evidence in the record as to when Hargrove handed the complaint to prison officials. However, it is clear the operative date is between August 27, 2004 and September 20, 2004. As discussed, *infra*, both of these dates occur before Hargrove properly exhausted the administrative remedies available to him at NCCF.

[FN2](#). The Nassau County University Medical Staff are employed by the Nassau Health Care Corporation ("NHCC"). Pursuant to the Correctional Center Health Services Agreement between the County of Nassau and NHCC, dated September 24, 1999, NHCC provides medical services for inmates at NCCF. County Defs.'s

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

Not. of Motion, Decl., at 1.

[FN3](#). Reilly and NCCF are represented separately from NHCC. Accordingly, when a distinction is necessary, Reilly and NCCF will be referred to as “County Defendants” and Nassau County University Medical Staff and NHCC will be referred to as “NHCC Defendants.”

(1)

Tuberculosis Testing at NCCF

Upon entering NCCF, new prisoners must first go through medical intake. Aff. of Kim Edwards, (“Edwards Aff.”) ¶ 3. This standard process usually takes seventy-two hours. Edwards Aff. ¶ 4. During medical intake, NCCF tests inmates for TB. Aff. of Getachew Feleke (“Feleke Aff.”) ¶ 3. NCCF generally uses a PPD test to detect latent TB. Feleke Aff. ¶ 3. However, if an inmate has previously tested positive for TB, it is NCCF's policy to test for TB using an x-ray instead. [FN4](#) Feleke Aff. ¶ 3. As part of its Infectious Disease Program, NCCF re-tests inmates for TB each year, beginning after they have been housed in that facility for one year. Edwards Aff. ¶ 5.

[FN4](#). According to WebMD, “[a] tuberculin skin test should not be done for people who have a (1) Known TB infection [or a] (2) Positive tuberculin skin test in the past. A second test may cause a more severe reaction to the TB antigens.” Jan Nissl, RN, BS, *Tuberculin Skin Tests*, W E B M D , h t t p : / / www.webmd.com/hw/lab_tests/hw203560.asp (last visited Jan. 31, 2007).

(2)

Hargrove's Tuberculosis Testing at NCCF

On March 15, 2002, Hargrove was incarcerated at NCCF.

NHCC Defs.' 56.1 Statement ¶ 1. Before entering the general population, Hargrove was processed through medical intake. NHCC Defs.' 56.1 Statement ¶ 2. The NCCF Medical Intake Chart for Hargrove, dated March 15, 2002 (“3/15/02 Chart”), shows that Hargrove informed medical staff that he had previously been exposed to [tuberculosis](#). NHCC Defs.' Notice of Mot., Ex. C, at 1; NHCC Defs.' 56.1 Statement ¶ 2. The 3/15/02 Chart also shows that Hargrove reported testing positive to a prior PPD test and that he had been treated for TB in 2000. NHCC Defs.' Notice of Mot., Ex. C, at 1. Hargrove alleges that he was exposed to and treated for TB in 1997. Hargrove's Aff. in Opp. to Mot. for Summary Judgment, (“Aff. in Opp.”), Ex. A at 1-2. Defendants contend that Hargrove was given an x-ray during the medical intake process because of his reported positive PPD test, and that the x-ray was negative, showing no active TB infection. NHCC Defs.' 56.1 Statement ¶ 2; Edwards Aff. ¶ 3. Without specifying a date, Hargrove generally states that his “request to be x-rayed was denied.” Aff. in Opp. at 3.

*2 Pursuant to NCCF's Infectious Disease Program, after being incarcerated in NCCF for a year, Hargrove was scheduled to be re-tested for TB. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. On May 24, 2003, Hargrove was given a PPD skin test. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. This test was negative. Edwards Aff. ¶ 5; NHCC Defs.' 56.1 Statement ¶ 4. According to Hargrove, he requested an x-ray instead of a PPD test because of his previous exposure to TB, but was forced to submit to the PPD test. He also alleges that defendants threatened to put him in “keep lock” or “lock up” unless he submitted to the PPD test. [FN5](#) Complaint, Ex. C; Aff. in Opp. at 1-4, Ex. A.

[FN5](#). Hargrove has made contradictory statements about being placed in “keep lock” or “lock up”. It is unclear whether he is alleging that defendants threatened to place him in “lock up” unless he submitted to the PPD test or whether he was actually placed in “lock up” until such time that he agreed to submit to the PPD tests. For example, in his complaint, Hargrove states that when he “refused to submit to another [PPD] test, the Correctional Authorities were brought in and placed [him] in lock up.” Complaint ¶ 4. In a hearing before Magistrate Judge Bloom on

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

January 31, 2005, Hargrove stated that he took the PPD tests because he was told that he would be placed in “lock up” until he submitted to the test. Hr'g Tr. 6:1-18; 9:5-10:10. In Exhibit B to his complaint, Hargrove alleges both that he was given an unwarranted TB shot and that when he refused the same shot he was placed in “keep lock.” Complaint, Ex. B. There is no evidence in the record that Hargrove was ever segregated from the general population while housed at NCCF, outside of the seventy-two hour initial medical intake period. Aff. of Sgt. Neumann (“Neumann Aff.”) at 1-2 (referring to prison records showing Hargrove's holding locations which demonstrate that he was never placed in “lock up”); NCCF 56.1 Statement ¶ E. Whether or not Hargrove was actually placed in “lock up” is not a material fact for purposes of this motion; as explained in detail, *infra*, Hargrove's failure to exhaust administrative remedies under the PLRA precludes a consideration of the merits of his [Section 1983](#) claim.

The following year, in June of 2004, Hargrove was scheduled to be retested. Edwards Aff. ¶ 6; NHCC Defs.' 56.1 Statement ¶ 5. Because of the contradiction between the negative May 2003 PPD test and his reported positive history, NCCF contacted the Infectious Disease Department of the Nassau County Medical Center. Edwards Aff. ¶ 6. It was suggested that Hargrove be given a two-step PPD test, administered fifteen days apart. Feleke Aff. ¶ 4; Edwards Aff. ¶ 6. Hargrove was given these two PPD skin tests in June 2004. Edwards Aff. ¶ 6; NHCC Defs.' 56.1 Statement ¶ 5. Again, Hargrove alleges that these tests were administered against his will and under threat of being placed in quarantine. Complaint, Exs. A, B; Aff. in Opp., Ex. A.

On December 3, 2004, Hargrove was seen by a physician's assistant. NHCC Defs.' 56.1 Statement ¶ 6. During this meeting, Hargrove complained of a dry cough and that the site on his forearm where the June 2004 PPD tests had been administered was red and swollen. NHCC Defs.' 56.1 Statement ¶ 6; 11/28/04 Sick Call Request.

Hargrove's December 18, 2004 chart notes a positive PPD

test and an order was placed in the chart that Hargrove not be submitted for future PPD tests. Edwards Aff. ¶ 7; NHCC Defs.' 56.1 Statement ¶ 8. *See also* 11/19/2004 Grievance.

Hargrove alleges that the following physical ailments were caused by the PPD tests: chronic coughing, [high blood pressure](#), chronic back pain, [lung infection](#), dizzy spells, blurred vision and a permanent scar on both his forearms. Complaint, Ex. C; Aff. in Opp. at 3-4.

(3)

NCCF's Inmate Grievance Procedure

NCCF has had an inmate grievance program (“IGP”) in place since 2001. Aff. of Kenneth Williams, (“Williams Aff.”), at 2. NCCF's IGP is carried out in conformance with the New York State Commission of Corrections Minimum Standards and Regulations for Management of County Jails and Penitentiaries (“Minimum Standards”). *Id.*

The IGP is designed to resolve complaints and grievances that an inmate may have regarding the inmate's care and treatment while incarcerated at NCCF. Williams Aff. at 2. Upon entering NCCF, all inmates receive a copy of the NCCF inmate handbook, which outlines the IGP. *Id.*

*3 The record does not include an actual copy of NCCF's IGP, but the NCCF's IGP is detailed in the affidavit of NCCF Investigator Kenneth Williams. [FN6](#) The IGP encourages inmates to resolve their grievances informally with the staff member assigned to the inmate housing unit first. *Id.* If an acceptable resolution cannot be reached, inmates must then proceed through the formal three-step process set out in the IGP. *Id.* at 3.

[FN6.](#) Hargrove does dispute any statements made by Investigator Williams regarding the inmate grievance procedure, time limits or its availability to him. Furthermore, Hargrove does

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

not dispute that he received a handbook outlining the IGP.

The first step requires an inmate to submit his grievance form [FN7](#) to the Inmate Grievance Unit by placing it in a locked box located in each housing area, “within five days of the date of the act or occurrence giving rise to the grievance.” [FN8](#) *Id.* at 2-3. NCCF indexes all grievance forms filed by inmates in a log book and in a computer system. *Id.* at 1, 3. Once a grievance form is received by the Inmate Grievance Unit, the grievance is investigated and the inmate will receive a written determination of the outcome from the Inmate Grievance Coordinator in Section II of the grievance form. [FN9](#) *Id.* at 3. The inmate is then given a choice to accept or appeal the decision by checking the desired selection and signing his name in Section III of the grievance form. *See, e.g.*, 11/19/2004 Grievance form. If the inmate is not satisfied with the decision of the Inmate Grievance Coordinator, the inmate may appeal the determination to the Chief Administrative Officer. Williams Aff. at 3. Finally, if the inmate is not satisfied with the Chief Administrative Officer's determination, the inmate may appeal to the New York State Commission of Correction Citizen's Policy and Complaint Review Council (“Council”). *Id.* at 3. The Council will then render a final determination. *Id.* at 3.

[FN7.](#) The grievance forms contain four sections to be utilized throughout all three steps of the IGP. Section I provides space for the inmate to explain his complaint and the actions he requests as relief. Section II is for the decision of the Inmate Grievance Coordinator. Section III is titled “Acceptance/Appeal of Grievance Coordinator's decision” and contains two mutually exclusive options in which the inmate must choose one or the other: “I have read and accept the Grievance Coordinator's decision,” or “I have read and appeal the Grievance Coordinator's decision.” Section IV provides space for the decision of the Chief Administrative Officer.

[FN8.](#) Hargrove has not argued that he was unaware of this five-day deadline.

[FN9.](#) There is no evidence in the record specifying the how long an inmate has to appeal inaction by the Inmate Grievance Unit.

(4)

Authenticity of the Grievance Forms and Other Documents Submitted by Hargrove

In support of his allegations that he continuously informed defendants that he had been exposed to TB and, therefore, should not have been given PPD tests, Hargrove submitted three letters with his complaint, two of which were addressed to the Inmate Grievance Committee and one of which was addressed to “To whom this may concern.” Complaint, Exs. A-C. He also submitted five complaint letters written to Sheriff Reilly, seventeen sick call requests and nine grievance forms during discovery and with his Affidavit in Opposition to Defendants' Motion for Summary Judgment, explaining that some of the medical records and notarized letters were “missing.” Aff. in Opp, Ex. A at 2. Defendants call the authenticity of most of these documents into question, contending that Hargrove never submitted any grievance form or complaint letter before he filed his complaint. County Defs.' Mem. of Law at 16-21; County Defs.' 56.1 Statement at ¶¶ B2, C3, D3.

Kenneth Williams, an investigator at NCCF in the Inmate Grievance Unit, testified that he reviewed all of the grievance forms, complaint letters and sick call requests annexed to Hargrove's Complaint and to Hargrove's Affidavit in Opposition to Defendants' Motion for Summary Judgment. Williams Aff. at 2. Williams testified that he examined the grievance records at NCCF and searched “for any grievances by plaintiff/inmate Hargrove” and found “only two.” [FN10](#) Williams Aff. at 1. The first grievance, dated November 19, 2004, complained that the medical staff continued “forcing [Hargrove] to take a T.B. shot while [he] keep[s] telling them that [he] has been exposed to T.B.” 11/19/2004 Grievance; Williams Aff. at 1. In response to this grievance, Hargrove's “positive” TB status was noted in his medical records and an order was placed in Hargrove's medical chart, stating that Hargrove not be subjected to future PPD tests. 11/19/2004 Grievance, Section II;

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

Williams Aff. at 1; NHCC Defs.' 56.1 Statement ¶ 8; Edwards Aff. ¶ 7. In Section III of the 11/19/2004 Grievance, Hargrove acknowledged that he had read the Grievance Coordinator's decision, and that he chose to accept the decision instead of appealing it. 11/19/2004 Grievance. The other grievance received by the Grievance Unit, dated May 11, 2005, complained of an unrelated matter. 5/11/2005 Grievance (complaining of back problems and requesting the return of his medical shoes); Williams Aff. at 1. Thus, Williams concluded that, beside the 11/19/2004 and 5/11/2005 Grievance Forms, none of the other documents were "received by the grievance unit, and, given the locked box system, the grievance-forms were never submitted by plaintiff/inmate." Williams Aff. at 2.

FN10. It is NCCF's procedure to forward to the attention of the Grievance Unit all official grievance forms and complaint letters-even ones not specifically addressed to the Grievance Unit. Williams Aff. at 3.

*4 A visual examination of the grievance forms Hargrove submitted in support of his claims suggests forgery. Five of the nine grievance forms were requests to stop PPD testing. *See* April 19, 2002 grievance; April 28, 2002 grievance; April 20, 2003 grievance; April 28, 2003 grievance; November 19, 2004 grievance. The remaining grievance forms concerned Hargrove's requests for medical shoes. *See* March 18, 2002 grievance; July 6, 2002 grievance; February 20, 2003 grievance; May 11, 2005 grievance. Of the grievance forms complaining of unwanted PPD tests, the April 28, 2002 grievance form is a patent photocopy of the April 19, 2002 grievance form, and the April 28, 2003 grievance form is a patent photocopy copy of the April 20, 2003 grievance form, with only the handwritten dates changed. The only potentially authentic grievance forms relating to Hargrove's complaint about the PPD testing are dated April 19, 2002, April 20, 2003, and November 19, 2004. Of these grievance forms, only the November 19, 2004 has been authenticated by NCCF personnel. *See generally* Williams Aff. at 1-4.

Turning to the complaint letters addressed to Reilly, many contain notary stamps cut from the bottom of unrelated

documents and photocopied onto the bottom of the complaint letters. *See* County Defs.' Mem. of Law at 18-21. C.O. Thomas McDevitt and C.O. Paul Klein, both of whom perform notary services for prisoners at NCCF, have submitted sworn affidavits, stating that they kept individual Notary Log Books covering all dates relevant to this litigation. Aff. of C.O. Klein, ("Klein Aff."), at 1; Aff. of C.O. McDevitt, ("McDevitt Aff."), at 1. McDevitt's Notary Log Book shows that he notarized only one document for Hargrove. This document, dated May 13, 2002, was a motion related to Hargrove's criminal trial. McDevitt Aff. at 1-2. Hargrove signed the Notary Log Book acknowledging receipt of that notarized motion. McDevitt Aff. at 2. McDevitt states that he never notarized any other documents for Hargrove. McDevitt Aff. at 2. However, McDevitt's stamp and signature dated May 13, 2002 (the date of the legitimate notarization) appear on Hargrove's letter to Sheriff Reilly dated May 10, 2002. County Defs.' Not. of Motion, Ex. A.

These facts repeat themselves in regard to the documents bearing the notary stamp and signature of Klein. Klein had performed several legitimate notarizations for Hargrove in connection to Hargrove's criminal trial. Klein Aff. at 1-2. Hargrove signed Klein's Notary Log Book acknowledging receipt of those notarized documents. Klein Aff. at 2. However, Klein states that he never notarized any of Hargrove's letters addressed to Sheriff Reilly that bear Klein's stamp and signature. Klein Aff. at 2. On all of the documents that Hargrove submitted bearing Klein's stamp and signature, the dates and signatures of Klein match identically to the dates on which he had performed legitimate notarizations for Hargrove in connection with his criminal trial. Defendants argue it is clear that the documents bearing the stamps and signatures of McDevitt and Klein were not actually notarized by these notaries. County Defs.' Mem. of Law at 17-22.

*5 Hargrove does not deny these allegations. Instead, he resubmits the documents that McDevitt and Klein testify they did not notarize with his Affidavit in Opposition and insists that the documents "refute[] the assertions put forth by the defendants." Aff. in Opp. at 2.

Discussion

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

(1)

Summary Judgment Standard

A motion for summary judgment is granted when “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). A court ruling on a summary judgment motion must construe the facts in the light most favorable to the non-moving party and draw all reasonable inferences in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Williams v. Metropolitan Detention Center, 418 F.Supp.2d 96, 100 (E.D.N.Y.2005). Defendants, the moving party in this action, bear the burden of demonstrating the absence of a genuine issue of material fact. Baisch v. Gallina, 346 F.3d 366, 371 (2d Cir.2003).

As Hargrove is proceeding *pro se*, his complaint must be reviewed carefully and liberally, and be interpreted to “raise the strongest argument it suggests,” Green v. United States, 260 F.3d 78, 83 (2d Cir.2001), particularly when civil rights violations are alleged, *see, e.g., McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir.2004). Plaintiff’s complaint does not specify the legal theories upon which it relies, but, in construing his complaint to raise its strongest arguments, it will be interpreted to raise claims under 42 U.S.C. § 1983. *See, e.g., Dufort v. Burgos*, No. 04-CV-4940, 2005 WL 2660384, at *2 (E.D.N.Y. Oct. 18, 2005) (liberally construing plaintiff’s complaint, which failed to specify the legal theory or theories upon which it rested, as, *inter alia*, a claim under 42 U.S.C. § 1983); Williams, 418 F.Supp.2d at 100 (same).

(2)

Prison Litigation Reform Act

a. Purpose of the Prison Litigation Reform Act

The PLRA was intended to “reduce the quantity and improve the quality of prisoner suits.” Woodford v. Ngo,

--- U.S. ---, 126 S.Ct. 2378, 2387 (2006) (quoting Porter v. Nussle, 534 U.S. 516, 524 (2002)). It seeks to eliminate unwarranted interference with the administration of prisons by federal courts, and thus “ ‘affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.’ ” Woodford, 126 S.Ct. at 2387 (quoting Porter, 534 U.S. at 525). *See also Booth v. Churner*, 532 U.S. 731, 739 (2001). Formal grievance procedures allow prison officials to reconsider their policies, implement the necessary corrections and discipline prison officials who fail to follow existing policy. *See Ruggiero v. County of Orange*, 467 F.3d 170, 177-78 (2d Cir.2006).

b. The Exhaustion Requirement

The PLRA’s “invigorated” exhaustion provision, 42 U.S.C. § 1997e(a), provides the mechanism to reduce the quantity and improve the quality of prisoners’ suits by requiring that prison officials have the opportunity to address prisoner complaints through internal processes before allowing a case to proceed in federal court. Woodford, 126 S.Ct. at 2382 (citing Porter, 534 U.S. at 524). Section 1997e(a) provides that:

*6 [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

The exhaustion requirement is a mandatory condition precedent to any suit challenging prison conditions, including suits brought under Section 1983. Woodford, 126 S.Ct. at 2383; Ruggiero, 467 F.3d at 174; Williams, 418 F.Supp.2d at 100-01. The exhaustion provision is applicable to suits seeking relief, such as money damages, that may not be available in prison administrative proceedings, as long as other forms of relief are obtainable through administrative channels. Giano v. Goord, 380 F.3d 670, 675 (2d Cir.2004); *see also Woodford*, 126 S.Ct. at 2382-83 (“[A] prisoner must now exhaust

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

administrative remedies even where the relief sought-monetary damages-cannot be granted by the administrative process.”) (citing [Booth, 532 U.S. at 734](#)).

In June 2006, the Supreme Court held that the PLRA requires “proper exhaustion” before a case may proceed in federal court. [Woodford, 126 S.Ct. at 2387](#). “Proper exhaustion” requires a prisoner to use “ ‘all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).’ ” [Ruggiero, 467 F.3d at 176](#) (citing [Woodford, 126 S.Ct. at 2385](#) (emphasis in original)). Although the level of detail necessary to properly exhaust a prison's grievance process will vary from system to system, [Jones v. Bock, 127 S.Ct. 910, 2007 WL 135890, at *12 \(Jan. 22, 2007\)](#), “proper exhaustion” under the PLRA “ ‘demands compliance with [that] agency's deadlines and other critical procedural rules.’ ” [Ruggiero, 467 F.3d at 176](#) (quoting [Woodford, 126 S.Ct. at 2386](#)). Thus, the PLRA's exhaustion requirement is not satisfied by “untimely or otherwise procedurally defective attempts to secure administrative remedies.” [Ruggiero, 467 F.3d at 176](#) (citing [Woodford, 126 S.Ct. at 2382](#)).

(3)

Exhaustion Analysis: Hargrove did not Exhaust the Administrative Remedies Made Available by NCCF prior to Bringing Suit

[Section 1997e\(a\)](#) of the PLRA applies to Hargrove's complaint; Hargrove was and continues to be confined in a correctional facility, see [Berry v. Kerik, 366 F.3d 85, 87 \(2d Cir.2004\)](#), and Hargrove's claim is about a “prison condition” within the meaning of the PLRA, see [Williams, 418 F.Supp.2d at 101](#). See also [Sloane v. W. Mazzuca, No. 04-CV-8266, 2006 WL 3096031, at *4 \(S.D.N.Y. Oct. 31, 2006\)](#) (recognizing PLRA's application to complaint alleging retaliation by prison officials for plaintiff's refusal to consent to a PPD test). Accordingly, the merits of Hargrove's [Section 1983](#) claims can only be addressed if it is first determined that Hargrove properly exhausted each claim under [Section 1997e\(a\)](#) of the PLRA before filing his complaint in federal court.

*7 Hargrove has submitted both forged [FN11](#) and authentic grievance forms in opposing defendants' motions for summary judgment. Excluding, for the moment, the forged documents, NCCF's records reflect that Hargrove did not submit his first grievance until after he filed the instant complaint. Williams Aff. at 1. Hargrove's first grievance complaining of unwanted PPD testing is dated November 19, 2004, Williams Aff. at 1, two to three months after Hargrove filed his complaint. Additionally, this first grievance, dated November 19, 2004, was submitted five months after the last PPD test was administered to him in June 2004. NHCC Defs.' 56.1 Statement ¶¶ 5,6. This five-month period far exceeds the five-day window provided by NCCF's IGP. Since Hargrove failed to comply with the IGP's deadlines, he did not properly exhaust the available administrative remedies. [Ruggiero, 467 F.3d at 176](#) (“ ‘untimely or otherwise procedurally defective attempts to secure administrative remedies do not satisfy the PLRA's exhaustion requirement.’ ”) (quoting [Woodford, 126 S.Ct. at 2382](#)).

[FN11](#). Based on an examination of the documents themselves, as well as the uncontradicted testimony of the notaries performing services for prisoners at NCCF, see generally Klein Aff.; McDevitt Aff., and of the investigator in the Inmate Grievance Unit, see generally Williams Aff., it appears that many of the documents submitted by Hargrove are forgeries. However, in order to view the facts in the light most favorable to Hargrove, and so as to avoid making findings of fact in a summary judgment motion, for the purposes of the exhaustion analysis, all of the documents will be considered to be authentic. However, for purposes of the sanctions analysis, the documents will be explored and the consequences of Hargrove's misrepresentations will be addressed.

Furthermore, even if the falsified grievance forms Hargrove submitted in support of his claim are considered authentic, they are still untimely. The diagnostic TB tests (whether x-ray or PPD tests) were given to Hargrove on March 15, 2002, May 24, 2003 and in June of 2004, but the grievance forms Hargrove submitted complaining of unwanted PPD tests are dated April 19, 2002, April 28, 2002, April 20, 2003, April 28, 2003 and November 19,

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

2004. None of these grievances were filed “within five days of the of the date of the act or occurrence giving rise to the grievance.” Williams Aff. at 3. There is no evidence in the record suggesting that NCCF's IGP allows for a tolling of the five-day time limit in which to file a grievance.^{FN12}

(4)

No Grounds to Excuse Plaintiff's Failure to Exhaust

^{FN12}. Even if the submitted grievances had been filed within the proscribed time period, they only show that Hargrove's grievances reached an Inmate Grievance Coordinator, the first formal step of NCCF's three-step administrative grievance process; Hargrove never appealed to the Chief Administrative Officer. By failing to take the next available step in NCCF's IGP, Hargrove failed to satisfy the mandatory exhaustion requirement. See, e.g., [Williams, 418 F.Supp.2d at 101, 102](#) (dismissing *pro se* complaint where plaintiff could only show he exhausted two of the four-step process mandated by prison's administrative process).

While the letters to Reilly and sick call requests show that Hargrove attempted to bring his complaints about the PPD testing to the attention of the prison staff, see, e.g., Aff. in Opp., Exs. A-D, NCCF's IGP requires use of formal grievance forms. Thus, writing complaint letters and submitting sick call requests did not properly exhaust NCCF's available administrative remedies. See, e.g., [Hernandez v. Coffey, No. 99-CV-11615, 2006 WL 2109465, at *4 \(S.D.N.Y. July 26, 2006\)](#) (holding letters did not satisfy plaintiff's exhaustion obligation); [Williams, 418 F.Supp.2d at 101](#) (holding that because plaintiff's efforts to convey his medical condition through letters and conversations with the warden and medical staff did “not include the required steps of the PLRA's administrative remedy process,” plaintiff failed to exhaust); [Mills v. Garvin, No. 99-CV-6032, 2001 U.S. Dist. LEXIS 3333, at *8 \(S.D.N.Y. Mar. 2, 2001\)](#) (“letter writing is not the equivalent of an exhaustion of administrative remedies under the PLRA”).

As Hargrove failed to properly exhaust his administrative remedies, this action is precluded by [42 U.S.C. § 1997e\(a\)](#) unless Hargrove can establish excuse for his failure to exhaust.

*8 Exhaustion is an affirmative defense that defendants have the duty to raise. [Jones, 2007 WL 135890, at *8-11](#); [Sloane, 2006 WL 3096031, at *4](#); [Williams, 418 F.Supp.2d at 101](#). Once argued by the defendants, a plaintiff has an opportunity to show why the exhaustion requirement should be excused or why his failure to exhaust is justified. See [Ruggiero, 467 F.3d at 175](#); [Collins v. Goord, 438 F.Supp.2d 399, 411 \(S.D.N.Y.2006\)](#) (“[T]he Second Circuit has cautioned that ‘while the PLRA's exhaustion requirement is ‘mandatory,’ certain caveats apply.’”) (internal citations omitted). Thus, before concluding that a prisoner failed to exhaust available administrative remedies as required by [Section 1997e\(a\)](#) of the PLRA, the following three factors must be considered: (1) whether administrative remedies were actually available to the prisoner; (2) whether defendants have either waived the defense of failure to exhaust or acted in such a way as to estop them from raising the defense; and (3) whether special circumstances, such as a reasonable misunderstanding of the grievance procedures, exist justifying the prisoner's failure to comply with the exhaustion requirement. [Ruggiero, 467 F.3d at 175](#) (citing [Hemphill v. New York, 380 F.3d 680, 686 \(2d Cir.2004\)](#)).^{FN13}

^{FN13}. Courts in the Second Circuit have questioned what effect, if any, the Supreme Court's recent decision in *Woodford* requiring “proper exhaustion” may have on the three-step *Hemphill* inquiry. The Second Circuit has yet to address this issue. See [Ruggiero, 467 F.3d at 175-76](#) (declining to “determine what effect *Woodford* has on our case law in this area ... because [plaintiff] could not have prevailed even under our pre-*Woodford* case law). To date, district courts have acknowledged the tension, but resolved to apply *Hemphill* to exhaustion claims until instructed otherwise by the Second Circuit. See, e.g., [Larkins v. Selsky, 04-CV-5900, 2006 WL 3548959, at *9, n. 4 \(S.D.N.Y. Dec. 6,](#)

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

[2006](#)) (applying the current law of the Second Circuit to exhaustion claims); [Sloane, 2006 WL 3096031, at *5](#) (“Until such time as the Court of Appeals considers the impact of *Woodford*, if any, on its prior rulings, this Court must follow the law of the Second Circuit. The Court will therefore apply the current law of this circuit to the exhaustion claims.”); [Collins v. Goord, 438 F.Supp.2d at 411 n. 13](#) (acknowledging that *Woodford* and *Hemphill* may be in tension, but deciding exhaustion claims under *Hemphill* inquiry); [Hernandez v. Coffey, No. 99-CV11615, 2006 WL 2109465, at *3 \(S.D.N.Y. July 26, 2006\)](#) (same). Here, Hargrove does not prevail under *Hemphill*; therefore, there is no occasion to address the potential effect *Woodford* may have had in his case.

a. Whether administrative remedies were “available” to Hargrove

The first step in the *Hemphill* inquiry requires a court to determine whether administrative remedies were available to the prisoner. [Hemphill, 380 F.3d at 686](#). The test for assessing availability is an “objective one: that is, would a similarly situated individual of ordinary firmness have deemed them available.” [Id. at 688](#) (internal quotation marks omitted). In making this determination, “courts should be careful to look at the applicable set of grievance procedures.” [Abney v. McGinnis, 380 F.3d 663, 668 \(2d Cir.2004\)](#). Exhaustion may be considered unavailable in situations where plaintiff is unaware of the grievance procedures or did not understand it, [Ruggiero, 467 F.3d at 179](#), or where defendants' behavior prevents plaintiff from seeking administrative remedies,^{FN14} [Hemphill v. State of New York, 380 F.3d 680, 686 \(2d Cir.2004\)](#).

^{FN14}. Case law does not clearly distinguish between situations in which defendants' behavior renders administrative remedies “unavailable” to the plaintiff and cases in which defendants are estopped from asserting non-exhaustion as an affirmative defense because of their behavior. As such, there will be some overlap in the analyses.

Here, Hargrove has not claimed that NCCF's administrative grievance procedure was unavailable to him. In fact, Hargrove demonstrated his access to and knowledge of NCCF's IGP by filing proper grievances on November 19, 2004 and on May 10, 2005. Hargrove did not dispute any part of Investigator Williams's affidavit detailing the IGP and its availability to inmates since 2001. Specifically, Hargrove did not dispute, upon entering the facility, that he received a copy of the inmate handbook outlining the IGP. He has not claimed that he is unfamiliar with or unaware of NCCF's IGP. Hargrove has not alleged that prison officials failed to advance his grievances^{FN15} or that they threatened him or took any other action which effectively rendered the administrative process unavailable.

^{FN15}. Although not specifically alleged, interpreting the evidence to “raise the strongest argument,” Hargrove may be arguing that NCCF's IGP was not available to him because the Grievance Coordinator failed to respond to his grievances. In the single grievance regarding PPD tests that defendants concede is authentic, Hargrove writes, “[n]ow for the third time your office refused to answer my grievances so please look into this matter because the T.B. shot is [sic] effecting my health.” 11/19/04 Grievance. This language implies that Hargrove filed grievances in the past and received no response from the Inmate Grievance Coordinator. Furthermore, Hargrove wrote on one of the submitted copies of the November 19, 2004 grievance that “[t]his is the only accepte[sic] that Plaintiff got back from all grievances and letters that the Plaintiff sent to Sheriff Riley and his medical staffs about his staff making [sic] take T.B. test for 3 year[s].” County Defs.' Not. of Motion, Ex. A, 11/19/2004 grievance.

First, it must be reiterated that filing of the initial grievances was untimely. However, even assuming *arguendo* that the original grievances had been timely filed, district courts in the Second Circuit have held that the “lack of a response from the [Inmate Grievance Review Committee] does not excuse an inmate's obligation to exhaust his

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

remedies through available appeals.” [Hernandez v. Coffey](#), 2006 WL 2109465, at *3-5. See also [Hemphill](#), 380 F.3d at 686 (“Threats or other intimidation by prison officials may well deter a prisoner of ‘ordinary firmness’ from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system”); [Acosta v. Corr. Officer Dawkins](#), No. 04-CV-6678, 2005 WL 1668627, at *3 (S.D.N.Y. July 14, 2005) (inmate required to appeal lack of response to exhaust administrative remedies); [Mendoza v. Goord](#), No. 00-CV-0146, 2002 U.S. Dist. LEXIS 22573, at *6 (S.D.N.Y. Nov. 21, 2002) (“If, as a result of a negligent error by prison officials-or even their deliberate attempt to sabotage a prisoner’s grievance-the prisoner [does not receive a response] on his complaint, he is not thereby forestalled from appealing”). Hargrove did not assert or offer evidence suggesting that he appealed the unresponsiveness or that those appeals were not advanced.

*9 Additionally, Hargrove’s transfer from NCCF to Sing Sing Correctional Facility (“Sing Sing”) in July 2005 did not excuse his previous failure to properly exhaust. See, e.g., [Sims v. Blot](#), No. 00-CV-2524, 2003 WL 21738766, at *4 (S.D.N.Y. July 25, 2003) (determining that failure to exhaust administrative remedies is not excused by transfer to another facility); [Santiago v. Meinsen](#), 89 F.Supp.2d 435, 440-41 (S.D.N.Y.2000) (determining that plaintiff should not be “rewarded” for failing to participate in grievance procedure before being transferred). Hargrove had ample opportunity to properly file his grievances and to appeal their results as required by NCCF’s procedures while he was imprisoned at NCCF. The last PPD test Hargrove complains of was given in 2004; therefore, Hargrove had until June or July of 2004 to timely file his grievance in accordance with NCCF’s IGP. Hargrove was not transferred to Sing Sing until July 2005. County Defs.’ Mem. of Law at 2. Thus, Hargrove’s transfer cannot excuse his previous failure to properly exhaust.

b. Estoppel

The second step of the inquiry asks whether defendants are estopped from raising exhaustion as a defense. Specifically, “whether the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it, or whether the defendants’ own actions inhibiting the inmate’s exhaustion of remedies may estop one or more of the defendants from raising the plaintiff’s failure to exhaust as a defense.” [Hemphill](#), 380 F.3d at 686 (internal citations omitted).

Here, Hargrove has not made any statements that would permit a finding that defendants should be estopped from raising the affirmative defense of exhaustion or that defendants waived the right to raise the defense. Defendants first raised the PLRA’s exhaustion requirement as an affirmative defense in their respective answers. See County Defs.’ Am. Answer at 3; NHCC Defs.’ Answer at 1. County Defendants raised it again in their motion for summary judgment. See County Defs.’ Mem of Law at 15-23. Thus, defendants are not estopped from raising the affirmative defense now. See, e.g., [Sloane](#), 2006 WL 3096031, at *8 (exhaustion defense not waived where defendants first raised it in their motion to dismiss).

Additionally, defendants have not threatened Hargrove or engaged in other conduct preventing him from exhausting the available administrative remedies. Cf. [Ziemba v. Wezner](#), 366 F.3d 161, 162 (2d Cir.2004) (holding defendants were estopped from asserting non-exhaustion because of prison officials’ beatings, threats and other conduct inhibiting the inmate from filing proper grievances); [Feliciano v. Goord](#), No. 97-CV-263, 1998 WL 436358, at *2 (S.D.N.Y. July 27, 1998) (holding defendants were estopped from asserting non-exhaustion where prison officials refused to provide inmate with grievance forms, assured him that the incidents would be investigated by staff as a prerequisite to filing a grievance, and provided prisoner with no information about results of investigation). Hargrove has not argued otherwise. See [Ruggiero](#), 467 F.3d at 178 (holding defendants were not estopped from asserting a failure to exhaust defense where plaintiff pointed to no affirmative act by prison officials that would have prevented him from pursuing administrative remedies); [Sloane](#), 2006 WL 3096031, at *8 (finding no estoppel where plaintiff did not argue that defendants prevented him from pursuing the available administrative remedies); [Hernandez](#), 2006 WL 2109465,

Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)
(Cite as: 2007 WL 389003 (E.D.N.Y.))

at *4 (finding no estoppel where plaintiff did not argue that any threats or intimidation prevented him from pursuing his appeals). Thus, for the same reasons that administrative remedies were not deemed unavailable to Hargrove, defendants are not estopped from raising a failure to exhaust defense.

c. Special circumstances

*10 Even where administrative remedies are available and the defendants are not estopped from arguing exhaustion, the court must “consider whether ‘special circumstances’ have been plausibly alleged that justify ‘the prisoner’s failure to comply with administrative procedural requirements.’” Hemphill, 380 F.3d at 688 (quoting Giano, 380 F.3d at 676). For example, plaintiff’s reasonable interpretation of regulations differing from prison official’s interpretation has been held to constitute a “special circumstance.” Giano, 380 F.3d at 676-77. No special circumstances have been alleged that would excuse Hargrove from availing himself of administrative remedies. See Sloane, 2006 WL 3096031, at *8; Freeman v. Goord, No. 02-CV-9033, 2004 U.S. Dist. LEXIS 23873, at * 9-10 (S.D.N.Y.2004) (granting motion to dismiss where “there is no evidence in the record ••• of any ‘special circumstances’ in this action.”)

(5)

Hargrove's Failure to Exhaust, in Addition to his Fraud on the Court, Warrants Dismissal with Prejudice

Hargrove has not sufficiently rebutted the defendants’ assertion of failure to exhaust, and a liberal reading of his submissions does not reveal any grounds to excuse that failure.

Because Hargrove filed a complaint in federal court before filing a grievance, permitting his unexhausted and unexcused claim to proceed would undercut one of the goals of the exhaustion doctrine by allowing NCCF to be haled into federal court without the “opportunity to correct

its own mistakes with respect to the programs it administers.” Woodford, 126 S.Ct. at 2385. See also Ruggiero, 467 F.3d at 178 (citing Porter, 534 U.S. at 525). Thus, his complaint must be dismissed.

In general, dismissal without prejudice is appropriate where plaintiff has failed to exhaust but the time permitted for pursuing administrative remedies has not expired. Berry v. Kerik, 366 F.3d 85, 87 (2d Cir.2004). Dismissal with prejudice is appropriate where “administrative remedies have become unavailable after the prisoner had ample opportunity to use them and no special circumstances justified failure to exhaust.” Berry, 366 F.3d at 88. Here, Hargrove’s administrative remedies were available to him during his entire period of confinement at NCCF. He remained incarcerated in NCCF throughout the time period in which he alleges the PPD tests were given. He could have exhausted remedies for his grievances at any time. Therefore, Hargrove had ample opportunity to seek administrative remedies but failed to do so. Because there is no evidence in the record that administrative remedies are still available to Hargrove, as the five-day time period had run, and because Hargrove has alleged no special circumstances justifying his failure to exhaust, his complaint is accordingly dismissed with prejudice. Berry, 366 F.3d at 88 (upholding dismissal with prejudice where plaintiff had no justification for his failure to pursue administrative remedies while they were available.)

*11 Additionally, defendants’ have moved for sanctions based on Hargrove’s alleged submission of falsified evidence. If a party commits a fraud on the court, the court has the inherent power to do whatever is reasonably necessary to deter abuse of the judicial process. Shangold v. The Walt Disney Co., No. 03-CV-9522, 2006 WL 71672, at *4 (S.D.N.Y. January 12, 2006) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)). Fraud upon the court has been defined as “fraud which seriously affects the integrity of the normal process of adjudication.” Gleason v. Jandrucko, 860 F.2d 556, 559 (2d Cir.1988); McMunn v. Mem’l Sloan-Kettering Cancer Center, 191 F.Supp.2d 440, 445 (S.D.N.Y.2002). In order for a court to grant sanctions based upon fraud, it must be established by clear and convincing evidence that a party has “sensibly set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by ... unfairly hampering

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(Cite as: 2007 WL 389003 (E.D.N.Y.))

the presentation of the opposing party's claim or defense.”
[McMunn](#), 191 F.Supp.2d at 455 (quoting [Aoude v. Mobil Oil Corp.](#), 892 F.2d 1115, 1119 (1st Cir.1989)).

After carefully reviewing the allegedly fraudulent documents, it must be concluded that Hargrove consciously falsified these documents. *See, e.g., Shangold*, 2006 WL 71672, at *1, *3 (finding clear and convincing evidence of fraud where plaintiffs fabricated a timeline and plot outlines to advance their claims); [McMunn](#), 191 F.Supp.2d at 446 (finding clear and convincing evidence of fraud where plaintiff edited audio tapes and represented that they were unedited during discovery). The notaries performing services for prisoners at NCCF testify that they never notarized many of the documents supplied by Hargrove. *See* Klein Aff.; McDevitt Aff. Furthermore, a visual examination of the documents themselves makes it clear that many of the documents submitted by Hargrove are forgeries.

In considering what sanction to impose, courts consider the following five factors: (i) whether the misconduct was the product of intentional bad faith; (ii) whether and to what extent the misconduct prejudiced the plaintiffs; (iii) whether there was a pattern of misbehavior rather than an isolated instance; (iv) whether and when the misconduct was corrected; and (v) whether further misconduct is likely to occur in the future. [Scholastic, Inc. v. Stouffer](#), 221 F.Supp.2d 425, 444 (S.D.N.Y.2002) (citing [McMunn](#), 191 F.Supp.2d at 461).

Here, Hargrove's deception was not an isolated instance; he fabricated the dates on many grievance forms, in addition to improperly duplicating notary stamps on complaint letters to make them look authentic. Klein Aff. at 2; McDevitt Aff. at 2; County Defs.' 56.1 Statement ¶¶ C3, D3. He submitted these forgeries to defendants during discovery and again as exhibits to his Affidavit in Opposition to Defendant's Motion for Summary Judgment. A severe sanction is warranted as Hargrove's forgeries were intentional, he never corrected them once their authenticity was challenged and he continues to insist on their veracity. Aff. in Opp. at 1-4. Given that there is clear and convincing evidence that Hargrove has continuously and consciously perpetrated a fraud on the court through his submission of fraudulent documents and sworn

affirmations of those documents' authenticity, dismissal with prejudice is especially appropriate. *See, e.g., Shangold*, 2006 WL 71672, at *5 (dismissing with prejudice where plaintiffs fabricated evidence to advance their claims); [Scholastic](#), 221 F.Supp.2d at 439-444 (dismissing with prejudice where plaintiff produced seven pieces of falsified evidence); [McMunn](#), 191 F.Supp.2d at 445 (dismissing with prejudice where plaintiff “lie[d] to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process”).

Conclusion

*12 Because Hargrove did not satisfy the exhaustion requirement under the PLRA, defendants' motions for summary judgment are granted. Further, considering the fraud Hargrove perpetrated on the court, the claims are dismissed against all defendants with prejudice. The Clerk of the Court is directed to close the case.

SO ORDERED:

E.D.N.Y., 2007.
Hargrove v. Riley
Not Reported in F.Supp.2d, 2007 WL 389003 (E.D.N.Y.)

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(Cite as: 2008 WL 2263191 (S.D.N.Y.))

C

I. BACKGROUND

Only the Westlaw citation is currently available.

United States District Court,

S.D. New York.

Tyrone WINSTON, Plaintiff,

v.

Richard WOODWARD, Nicholas Valhos, Charles Starley, Rene Hernandez, and John Does, Defendants.

No. 05 Civ. 3385(RJS).

May 30, 2008.

Tyrone Winston, pro se.

Judy Prosper, Esq., [Kevin P. McCaffrey, Esq.](#), Office of the New York State Attorney General, New York, NY, for Defendants.

MEMORANDUM AND ORDER

[RICHARD J. SULLIVAN](#), District Judge.

*1 Plaintiff Tyrone Winston brings this *pro se* civil rights action pursuant to [42 U.S.C. § 1983](#) against Richard Woodward, Nicholas Valhos, Charles Starley, Rene Hernandez, and John Does ("Defendants"), claiming that he was subjected to excessive force in violation of the Eighth and Fourteenth Amendments. On July 9, 2007, Defendants moved for summary judgment pursuant to [Rule 56\(c\) of the Federal Rules of Civil Procedure](#) on the ground that Plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), [42 U.S.C. § 1997e\(a\)](#). Plaintiff opposes summary judgment, arguing that he is excused from satisfying the PLRA's exhaustion requirement because: 1) any administrative remedies were functionally unavailable to him as a result of Defendants' misconduct; 2) Defendants are estopped from asserting a defense of non-exhaustion due to their prior misconduct; and 3) special circumstances precluded Plaintiff's compliance. (Pl.'s Opp. ¶¶ 3, 6, 7.)

For the reasons set forth below, Defendants' motion for summary judgment is granted.

A. The Facts

At all times relevant to the Complaint, Plaintiff was an inmate in the custody of the New York State Department of Correctional Services ("DOCS") at the Fishkill Correctional Facility ("Fishkill"). (Defendants' Rule 56.1 Statement ("Defs.' 56.1") ¶¶ 1, 16.) Plaintiff alleges that on May 29, 2004, while he was in his cell, Plaintiff was approached by Defendant Starley, who informed him that his cell was going to be searched. (Transcript of October 24, 2005 Deposition of Tyrone Winston ("Winston Dep. Tr.") at 34.) Defendant Starley then requested that Plaintiff place his hands out so that they could be handcuffed. (*Id.*) Plaintiff admits that he initially refused to comply with Defendant Starley's orders. (*Id.*) Upon his refusal Plaintiff was moved into the recreation pen, which was connected to the cell. (*Id.*) After being notified that Plaintiff refused to cooperate with the cell search, Defendant Woodward then entered the recreation pen and directed Plaintiff to put his hands on the wall. (*Id.* at 31.) Plaintiff claims that he complied with Defendant Woodward's orders. (*Id.*)

Plaintiff further alleges that, notwithstanding his compliance with the officers' directions, Defendants physically searched him. (*Id.* at 32.) He also claims that Defendant Valhos hit him in his testicles and that he was forcefully thrust onto the floor. (*Id.*) While on the floor, Plaintiff alleges that Defendant Woodward bent his left pinky finger backwards while he was being handcuffed, thereby dislocating it. (*Id.* at 32-33.) Additionally, he alleges that Defendant Valhos put his hand over Plaintiff's mouth to prevent him from shouting as a result of the pain he felt from his finger being dislocated, whereupon Plaintiff bit down on Valhos' finger. (*Id.* at 33.) Plaintiff asserts that following this altercation he was sent to receive medical treatment for his injury. (*Id.*) Thereafter, Plaintiff commenced a grievance proceeding against Defendants.

*2 Under the PLRA, an inmate must exhaust his administrative remedies prior to initiating a suit in federal

Not Reported in F.Supp.2d, 2008 WL 2263191 (S.D.N.Y.)

(Cite as: 2008 WL 2263191 (S.D.N.Y.))

court. See Porter v. Nussle, 534 U.S. 516, 532, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002); see also Macias v. Zenk, 495 F.3d 37, 40 (2d Cir.2007); Ruggiero v. County of Orange, 467 F.3d 170, 173 (2d Cir.2006); Brownell v. Krom, 446 F.3d 305, 310 (2d Cir.2006). DOCS has established an Inmate Grievance Program (“IGP”), the purpose of which is to provide inmates with an “orderly, fair, simple and expeditious method of resolving grievances” 7 N.Y.C.R.R. § 701.1(a); see also Abney v. McGinnis, 380 F.3d 663, 668-69 (2d Cir.2004); Cruz v. Jordan, 80 F.Supp.2d 109, 117-18 (S.D.N.Y.1999).

It is uncontested that the particular grievance procedure available to Plaintiff at the time of the incident involved a three-step process.^{FN1} (Defs.’ 56.1 ¶ 5.) ^{FN2} First, the formal grievance process is initiated by the filing of a written complaint with the Inmate Grievance Resolution Committee (“IGRC”) within fourteen work days from the date of the alleged incident.^{FN3} (*Id.*) If the IGRC does not grant the requested relief, the second step of the administrative procedure is the filing of an appeal with the Superintendent of the facility within four days after receipt of the IGRC’s written response. (*Id.*); see also 7 N.Y.C.R.R. § 701.1(b). If the Superintendent does not grant the requested relief, the third step is to appeal to the Central Office Review Committee (“CORC”) within four working days after receipt of the Superintendent’s written response. (Defs.’ 56.1 ¶ 5.) It is only after exhausting all three levels of this administrative review process that a prisoner may file a federal action and seek relief pursuant to § 1983, though failure to exhaust may be later deemed justified under several exceptions. Porter, 534 U.S. at 524; see also Giano v. Goord, 380 F.3d 670, 677-78 (2d Cir.2004).

^{FN1}. Since the filing of this suit, the IGP, pursuant to 7 N.Y.C.R.R. § 701, has been amended, effective May 23, 2007. All references to the IGP are therefore made with respect to the provisions in effect at the time the Plaintiff instituted this action.

^{FN2}. Despite the Defendants’ filing of the required documents giving notice to Plaintiff of the need to submit facts in support of his opposition, Plaintiff has not filed a 56.1

Opposition or 56.1 Statement of his own. All references are therefore to Defendants’ 56.1 Statement.

^{FN3}. The fourteen-day requirement may be waived upon a showing of “mitigating circumstances.” 7 N.Y.C.R.R. § 701.1(a).

There are also special procedures that a prisoner must follow when his or her grievance involves a claim of harassment, to ensure that harassment claims are submitted directly to the Superintendent. See 7 N.Y.C.R.R. § 701.11. Harassment is broadly defined in the IGP as any allegation involving employee misconduct—specifically “[e]mployee misconduct meant to annoy, intimidate, or harm an inmate” § 701.11(a). In such instances, the inmate is required to report the occurrence to the immediate supervisor of the employee alleged to have engaged in the misconduct. (Defs.’ 56.1 ¶ 7.)

After the grievance is filed, it is forwarded, along with supporting documents, to the Superintendent by the close of the same business day on which it was filed, in order to accelerate the grievance procedure. See 7 N.Y.C.R.R. § 701.11(b). Upon review of the harassment grievance, if it is determined that there is a *bona fide* harassment issue, the Superintendent may initiate an in-house investigation, request an investigation by the Office of the Inspector General or request an investigation by the State Police. See 7 N.Y.C.R.R. § 701.11(b)(4). Regardless of whether an investigation is initiated, the Superintendent must render a decision within twelve business days. See 7 N.Y.C.R.R. § 701.11(b)(5). If the Superintendent fails to respond within the time limit, the inmate may then appeal to the CORC. See 7 N.Y.C.R.R. § 701.11(b)(6), (7).

*3 Additionally, DOCS regulations require that a representative of IGRC visit Plaintiff’s housing unit at Fishkill at least once a week. (See Defs.’ 56.1 ¶ 17); see also 7 N.Y.C.R.R. § 304.14(b); N.Y.C.R.R. § 701.13(c). During such a visit, the IGRC representative is required to announce his presence at the units and to respond to any inquiries by inmates regarding grievances. (Declaration of Michelle Stone (“Stone Decl.”) ¶ 30.) If an inmate advises an IGRC representative that he had attempted to appeal a grievance to the CORC but his mail was tampered with, he

Not Reported in F.Supp.2d, 2008 WL 2263191 (S.D.N.Y.)

(Cite as: 2008 WL 2263191 (S.D.N.Y.))

would be advised that he could re-submit his appeal. (*See* 15.)
Defs.' 56.1 ¶ 31.)

On June 16, 2004, within fourteen days of the alleged May 29, 2004 incident, Plaintiff timely filed a grievance, claiming that the Defendants used excessive force against him, causing his left pinky to be fractured as well as asserting claims of harassment, mail tampering, and excessive searches of his cell. (*See* *Defs.*' 56.1 ¶ 8; *Stone Decl.* ¶ 8, Ex. A.) Since Plaintiff's grievance involved a charge of harassment, it was forwarded to the Superintendent's office for investigation on the day in which it was filed. (*See* *Defs.*' 56.1 ¶ 9.) An investigation was conducted, which included an interview of Plaintiff as well as the collecting of statements from all personnel allegedly involved in the incident. (*See id.* ¶ 10.)

On June 29, 2004, prior to receiving an initial determination from the grievance office, Plaintiff attempted to "appeal" his case on the grounds that he had not yet received such an initial determination. (*See id.* ¶ 12; *see also* *Stone Decl.* ¶ 13, Ex. E.) Specifically, he filed his appeal on an Inmate Grievance Compliant form, describing his problem as wanting to "appeal" his initial June 14, 2004 grievance. (*See* *Defs.*' 56.1 ¶ 12.) In response, Plaintiff was advised of the proper procedure to appeal and also that he would receive the Superintendent's timely response. (*See id.* ¶ 13; *see also* *Stone Decl.* ¶ 14, Ex. F.) ^{FN4}

^{FN4}. In the memorandum responding to Plaintiff's attempted appeal, he was also advised that the Inmate Grievance Complaint forms were not the proper method of appealing Supervisor's decisions. (*See* *Defs.*' 56.1 ¶ 13; *see also* *Stone Decl.* ¶ 14, Ex. F.)

On June 30, 2004, the Superintendent rendered his decision denying Plaintiff's grievance. ^{FN5} (*See* *Defs.*' 56.1 ¶¶ 11, 14; *see also* *Stone Decl.* ¶ 11, Ex. D.) Plaintiff does not dispute that he received the decision on or about June 30, 2004. (*Defs.*' Mem. at 6.) Plaintiff had four business days thereafter to file an appeal to the CORC. (*Defs.*' 56.1 ¶ 14.) There is nothing in the record demonstrating that Plaintiff filed that appeal, or made any other attempts to appeal the Superintendent's decision to the CORC. (*Id.* ¶

^{FN5}. Specifically, the Superintendent's decision stated, "[Plaintiff's] grievance is found to be without merit and therefore is denied." (*Defs.*' 56.1 ¶ 11; *see also* *Stone Decl.* ¶ 11, Ex. D.) Below the formal opinion was a section, labeled "appeal statement" that further advised "[i]f you wish to refer the above decision of the Superintendent, please sign below and return this copy to your Inmate Grievance Clerk. You have four working days from receipt of this notice to file your appeal." (*Stone Decl.* ¶ 11, Ex. D)

According to Fishkill's visitor logbook entries, between June 30, 2004 and August 31, 2004, IGRC representatives engaged in regular visits to the facility. ^{FN6} There is nothing in the record indicating that Plaintiff notified the IGRC representative that he was prevented from filing an appeal. (*Id.* ¶ 22.) Additionally, there is nothing in the record indicating that Plaintiff expressed a concern regarding his grievance to other Fishkill employees including medical personnel, corrections counselors or watch commanders. (*Id.* ¶ 26.)

^{FN6}. The logbook of entries of all visitors to Fishkill between June 1, 2004 and August 31, 2004 reflects that rounds were conducted by IGRC representatives on June 29, 2004; July 15, 2004; July 20, 2004; July 23, 2004; July 27, 2004; July 29, 2004; August 3, 2004; August 6, 2004; August 10, 2004; August 17, 2004; August 20, 2004; August 24, 2004; and August 31, 2004. (*See* *Defs.*' 56.1, ¶ 20.; *Stone Decl.* ¶¶ 26-29, Ex. H.)

*4 Plaintiff made a request for information regarding his appeal on August 3, 2005, over one year after he submitted his initial grievance. (*Id.* ¶ 27; *see also* *Stone Decl.* ¶ 17, Ex. G.) In response, Plaintiff was provided with a copy of the June 30, 2004 decision and informed that the time granted to him to appeal the Superintendent's judgment had expired. (*Defs.*' 56.1 ¶ 28; *see also* *Stone Decl.* ¶ 18, Ex. F.)

B. Procedural History

Not Reported in F.Supp.2d, 2008 WL 2263191 (S.D.N.Y.)

(Cite as: 2008 WL 2263191 (S.D.N.Y.))

Plaintiff commenced this suit on March 30, 2005. On January 19, 2006, the Honorable Kenneth M. Karas, District Judge, issued an Order instructing the Office of the Attorney General to investigate Plaintiff's allegations, take appropriate steps to ensure Plaintiff's safety, and provide a detailed report regarding the status of this inquiry to the Court. (See Jan. 19, 2006 Order.) DOCS responded to the Court's order on January 30, 2006, stating that there was no validity to these claims. (Letter from Donald Delaney, dated Jan. 30, 2006.) On September 4, 2007, this case was reassigned to the undersigned.

Defendants filed the instant motion for summary judgment on July 9, 2007, pursuant to [Rule 56\(c\) of the Federal Rules of Civil Procedure](#), on the grounds that Plaintiff failed to exhaust his administrative remedies under the PLRA. Plaintiff opposes the motion, arguing that he should be excused from adhering to the PLRA exhaustion requirements for three reasons. (Pl.'s Opp. ¶¶ 6-7.) First, he claims that he was subject to routine mail tampering and threats of retaliation by prison staff which caused the remedies to be unavailable to him. (*Id.* ¶¶ 3, 6.) Second, he contends that Defendants are estopped from asserting their defense by virtue of their misconduct in this case. (*Id.* ¶ 6.) Third, Plaintiff argues that special circumstances justify his failure to comply with the PLRA's procedural requirements. (*Id.* ¶ 7.) Plaintiff has not filed or produced any evidence in support of his opposition.

II. STANDARD OF REVIEW

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [Fed.R.Civ.P. 56\(c\)](#); see also [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265; [Bronx Household of Faith v. Bd. of Educ. of City of N.Y.](#), 492 F.3d 89, 96 (2d Cir.2007). The party moving for summary judgment has the initial burden to establish that no genuine issue of material fact exists. [Celotex](#), 477 U.S. at 323. The Court must view the evidence "in the light most favorable to the party opposing

the motion." *Id.*; see also [Addickes v. S.H. Kress & Co.](#), 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); [Rivkin v. Century 21 Teran Realty LLC](#), 494 F.3d 99, 103 (2d Cir.2007). Failure to meet this burden requires the court to deny the motion. [Celotex](#), 477 U.S. at 323.

*5 If the moving party meets this initial burden, however, the burden then shifts to the non-moving party to produce admissible evidence demonstrating that there is a genuine issue of material fact. *Id.* A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." [Anderson v. Liberty Lobby Inc.](#), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[O]nly when reasonable minds could not differ as to the import of evidence is summary judgment proper." [Bryant v. Maffucci](#), 923 F.2d 979, 982 (2d Cir.1991). As such, the role of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson](#), 477 U.S. at 249.

In reviewing a *pro se* litigant's pleadings, courts are compelled to construe such claims liberally. See [Abbas v. Dixon](#), 480 F.3d 636, 639 (2d Cir.2007); [Ferran v. Town of Nassau](#), 471 F.3d 363, 369 (2d Cir.2006); [Triestman v. Fed. Bureau of Prisons](#), 470 F.3d 471, 474 (2d Cir.2006); [Brownell](#), 446 F.3d at 310.

III. DISCUSSION

A. The PLRA Exhaustion Requirement

Plaintiff brings this action pursuant to [42 U.S.C. § 1983](#). [Section 1983](#) provides that "[e]very person who, under color of any statute ... subjects, or causes to be subjected, any citizen of the United States or other person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress" In response to the sharp rise in federal prisoner litigation under [§ 1983](#), Congress enacted the PLRA. See [Porter](#), 534 U.S. at 524. Specifically, in enacting the PLRA, Congress sought "to reduce the quantity and improve the quality of prisoner suits ... [as well as to provide] corrections officials time and opportunity to address complaints internally before allowing the initiation of a

Not Reported in F.Supp.2d, 2008 WL 2263191 (S.D.N.Y.)

(Cite as: 2008 WL 2263191 (S.D.N.Y.))

federal case.” *Id.* at 524-25; *Brownell*, 446 F.3d at 310; see also *Ruggiero*, 467 F.3d at 174; *Abney*, 380 F.3d at 667.

The PLRA states that “[n]o action shall be brought with respect to prison conditions under § 1983 ... by a prisoner confined in any ... correctional facility until such administrative remedies as are available are exhausted.” See 42 U.S.C. § 1993e(a). The exhaustion requirement applies with equal force to actions concerning *corrections officers' use of excessive force*. *Porter*, 534 U.S. at 520; see also *Ruggiero*, 467 F.3d at 173 (holding that under *Porter*, excessive force claims are subject to the PLRA's exhaustion requirement). Failure to exhaust administrative remedies is an affirmative defense. *Giano*, 380 F.3d at 675.

While the Second Circuit has recognized the exhaustion requirement, certain exceptions have also been acknowledged. See *Ruggiero*, 467 F.3d at 175; see also *Giano*, 380 F.3d at 677. In *Hemphill v. New York*, 380 F.3d 680, 686 (2004), the Second Circuit held that courts should undertake a three-pronged inquiry in cases in which a “prison plaintiff plausibly seeks to counter defendants' contention that the prisoner has failed to exhaust available remedies as required by the PLRA” See, e.g., *Macias*, 495 F.3d at 43 (applying the *Hemphill* three-party inquiry).

*6 Under *Hemphill*, a court should first consider “whether the administrative remedies were in fact ‘available’ to the prisoner.” 380 F.3d at 686. Second, a court must determine whether “the defendants' own actions inhibiting the inmate's exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense.” *Id.* Third, a court should examine whether there were “special circumstances” that excused plaintiff's failure to adhere to the administrative procedural requirements. *Id.*

The Supreme Court held in *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2386, 165 L.Ed.2d 368 (2006), that prisoners must properly exhaust administrative remedies prior to pursuing a federal action under the PLRA by strictly “[adhering to] the system's critical procedural rules.” Specifically, proper exhaustion “means using all steps that the agency holds out, and doing so

properly.” *Id.* at 2385. In the Court's view, prisoners would have little incentive to participate in the established grievance system unless “noncompliance carries a sanction.” *Id.* at 2388.

The Second Circuit has not yet addressed the effect, if any, of *Woodford* on the *Hemphill* three-part inquiry. “Several courts within the circuit have acknowledged uncertainty caused by the tension between *Hemphill* and *Woodford*,” noting, for example, that “the [Second Circuit] has at least partly retreated from its established exhaustion jurisprudence, recognizing the irreconcilable tension between *Woodford* and its earl[ier] decision[s] ... and acknowledging that under *Woodford* mere notice to prison officials through informal channels, without more, does not suffice to satisfy the PLRA procedural exhaustion requirement.” *Chavis v. Goord*, No. 00 Civ. 1418(LEK), 2007 WL 2903950, at *9 n. 8 (N.D.N.Y. Oct.1, 2007) (citations omitted); see also *Lawyer v. Gatto*, No. 03 Civ. 7577(RPP), 2007 WL 549440, at *4 n. 4 (S.D.N.Y. Feb.21, 2007) (noting that “[t]he Second Circuit has not yet addressed *Woodford*'s impact, and [that] the district courts in this circuit have continued to apply the caveats to cases involving the PLRA”); *Sloane v. Mazzuca*, No. 04 Civ. 8266(KMK), 2006 WL 3096031, at *5 (S.D.N.Y. Oct.31, 2006) (“The Second Circuit has not addressed how [*Hemphill*'s] three-part approach ... has been affected by *Woodford*” and “[u]ntil such time as the Court of Appeals considers the impact of *Woodford*, if any, on its prior rulings, this Court must follow the law of the Second Circuit. The Court will therefore apply the current law of this circuit to the exhaustion claims.”); *Hernandez v. Coffey*, No. 99 Civ. 11615(WHP), 2006 WL 2109465, at *3 (S.D.N.Y. July 26, 2006). As such, this Court adheres to clear Second Circuit authority, as well as the approach followed by other district courts in this Circuit and applies the *Hemphill* three-part inquiry to Plaintiff's exhaustion claims.

B. Analysis

1. Availability of Administrative Remedies

*7 Pursuant to § 1997e(a), exhaustion is required only where “such administrative remedies ... are available.” See *Mojias v. Johnson*, 351 F.3d 606, 609 (2d Cir.2003); *Snider v. Melindez*, 199 F.3d 108, 113-14 (2d Cir.1999).

Not Reported in F.Supp.2d, 2008 WL 2263191 (S.D.N.Y.)

(Cite as: 2008 WL 2263191 (S.D.N.Y.))

To determine whether administrative remedies were in fact available, the court must consider whether, from an objective point of view, a similarly situated person of ordinary resilience and intelligence would have deemed the remedies available. Hemphill, 380 F.3d at 688 (citing Davis v. Goord, 320 F.3d 346, 353 (2d Cir.2003)). The Second Circuit has held that “threats or other intimidation by prison officials may well deter a prisoner of ordinary firmness from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts.” Hemphill, 380 F.3d at 688 (citation omitted).

Plaintiff claims that threats of retaliation made by several corrections officers at Fishkill, including Defendants, made his ability to pursue his grievance “functionally unavailable” pursuant to the first Hemphill element. (Pl.’s Opp. ¶ 6.) Additionally, Plaintiff claims that he suffered harassment and that his mail was routinely tampered with, thus preventing him from successfully appealing the Superintendent’s ruling within the four-day period permitted under 7 N.Y.C.R.R. § 701.1(b). (*Id.* ¶¶ 3, 6.) Specifically, with regard to his mail-tampering claim, Plaintiff asserts that he mailed out his initial grievance under a fellow inmate’s name, which was received by the Superintendent. (*Id.* ¶ 3.) He further contends that additional grievances that he sent under his own name were not received, thereby “prov[ing]” that the Fishkill staff was tampering with his mail. (*Id.*)

Defendants respond that, even assuming the truth of those allegations, Plaintiff had ample opportunity to file an appeal. (Defs.’ Mem. at 12.) With regard to Plaintiff’s mail fraud claims, Defendants cite several ways in which Plaintiff could have sought relief, including filing an appeal to CORC, the presence of IGRC representatives during routine rounds as well as the availability of other medical and corrections officers at Fishkill who Plaintiff could have advised of any mail tampering or threatening behavior. (*Id.*) Additionally, Defendants claim that if Plaintiff had informed any IGRC representative or other staff member of such alleged tampering, he would have been advised that he could re-submit his appeal. (*Id.*) Yet, as previously stated, no such record of Plaintiff submitting an appeal or notifying an IGRC or other Fishkill employee exists. (*Id.*) Defendants also challenge Plaintiff’s assertion

that he should be excused from exhaustion, pointing out that he not only filed an initial grievance on June 16, 2004, but also a second additional grievance that was later consolidated with it, and also an “attempted” appeal prior to the Superintendent issuing his decision. (*Id.* at 13). As such, Defendants contend that Plaintiff cannot claim, under Hemphill, that a similarly situated individual of “ordinary firmness” would have deemed the ordinary grievance procedures unavailable. (*Id.*) This Court agrees.

*8 Plaintiff does not dispute that adequate administrative remedies were in place at Fishkill. Thus, as an initial matter, the Court finds that adequate administrative remedies were initially available to Plaintiff, in that grievance procedures were in place and generally made available to prisoners, including Plaintiff. See Cruz, 80 F.Supp.2d at 117 (observing that “New York provides an elaborate administrative grievance process for prisoners in New York State correctional facilities”); see also 7 N.Y.C.R.R. § 701 *et. seq.* (establishing the inmate grievance procedure).

As for Plaintiff’s claims that administrative relief was functionally unavailable to him, even taking the facts in the light most favorable to Plaintiff, the Court finds that Plaintiff fails to meet the “ordinary firmness” standard as set forth in Hemphill, 380 F.3d at 688. Although Plaintiff alleges that Defendants’ threats and retaliation prevented him from appealing his grievance, he also, by his own admission, filed an “appeal” using the Inmate Grievance Complaint form, on the day prior to the Superintendent rendering his decision, thus undercutting his claims that an appeal was functionally unavailable to him.

The case of Amador v. Superintendents of Department of Correctional Services is particularly instructive. No. 03 Civ. 0650(KTD), 2007 WL 4326747, at *1 (S.D.N.Y. Dec. 4, 2007). In Amador, seventeen plaintiffs asserted claims of sexual abuse and harassment against prison officials. *Id.* In response, the defendants brought a motion to dismiss the case, which the court converted into a motion for summary judgment, arguing that the plaintiffs failed to exhaust all administrative remedies. *Id.* at *7. The plaintiffs contended that the administrative remedies were unavailable due to threats made against them by prison officials. *Id.* at *8. In

Not Reported in F.Supp.2d, 2008 WL 2263191 (S.D.N.Y.)

(Cite as: 2008 WL 2263191 (S.D.N.Y.))

granting the defendants' motion, the court rejected the plaintiff's claims, noting that three of the plaintiffs were in fact able to file formal grievances, a fact which "directly [cut] against" the plaintiffs' argument that such administrative remedies were unavailable. *Id.*

Here, Plaintiff was able to file an "appeal" on June 29, 2004. While this attempt was premature, it demonstrates that Plaintiff was able to submit a formal appeal, despite his alleged claims of misconduct and harassment. As such, it is apparent from not only an objective point of view of a reasonable person of ordinary firmness in Plaintiff's position, but also the actual subjective viewpoint of Plaintiff himself, that administrative remedies were in fact available to him during the relevant time period. Therefore, Plaintiff's attempted appeal directly cuts against his contention that administrative remedies were functionally unavailable to him. *See id.*

Nor has Plaintiff produced any evidence to withstand summary judgment. As noted above, in response to a motion for summary judgment, "a plaintiff ... must do more than make broad factual allegations and invoke the appropriate statute." *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir.1995). Rather, the plaintiff must show that there are genuine issues of fact that may only be resolved at trial. *Id.*; *see also* *Anderson*, 477 U.S. at 250. While all reasonable inferences are drawn in favor of the non-moving party, courts in this Circuit have reviewed claims of retaliation by prisoners "with skepticism" because of the "ease with which a retaliation claim may be fabricated" *Nunez v. Goord*, 172 F.Supp.2d 417, 431 (S.D.N.Y.2001). *See also* *Colon*, 58 F.3d at 872 ("[W]e examine prisoners' claims of retaliation with skepticism and particular care."); *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir.1983).

*9 Here, Plaintiff claims that he should be excused from the PLRA's exhaustion requirement because he suffered retaliation for bringing his initial grievance, which included claims of harassment, misconduct and mail tampering, thereby preventing him from properly and timely appealing the Superintendent's decision. However, he does not specify the dates of the alleged misconduct, the details of the particular incidents of threats and

harassment, the officers who allegedly made threatening or harassing statements, or a copy of the alleged appeal that Plaintiff claims he sent through the mail that was, as he claims, fraudulently tampered with. Thus, Plaintiff's allegations "stand alone and unsupported." *Veloz v. New York*, 339 F.Supp.2d 505, 516 (S.D.N.Y.2004); *see also* *Curry v. Mazzuca*, No. 05 Civ. 1542(NRB), 2006 WL 250487, at *6 (S.D.N.Y. Feb.2, 2006) (dismissing plaintiff's claim that he should be excused from the exhaustion requirement on the grounds that prison officials failed to respond to his allegedly filed grievance as "there [was] no evidence whatsoever that such a grievance was actually filed with a grievance clerk or ignored by prison officials"); *Davidson v. Talbot*, No. 01 Civ. 473(CJQ), 2006 WL 1877144, at *7 (N.D.N.Y. July 5, 2006) (upholding the Magistrate's recommendation that plaintiff's "unsupported and unsubstantiated" claims of retaliation should be dismissed); *Nunez*, 172 F.Supp.2d at 432 ("[Plaintiff's] assertions, standing alone, do not provide sufficient evidence of retaliation.").

Accordingly, in the absence of any direct or circumstantial evidence to substantiate Plaintiff's claims that administrative remedies were unavailable to him, the Court finds that Plaintiff has failed to satisfy the PLRA's exhaustion requirement.

2. Estoppel

Pursuant to the second prong of *Hemphill*, involving estoppel, this Court must consider whether defendants' actions estop them from asserting plaintiff's failure to exhaust as an affirmative defense. *Ziemba v. Wezner*, 366 F.3d 161, 163 (2004). Estoppel will be found where "an inmate reasonably understands that pursuing a grievance through the administrative process will be futile or impossible." *Carini v. Austin*, No. 06 Civ. 5652(NRB), 2008 WL 151555, at *3 (S.D.N.Y. Jan.14, 2008); *see also* *Finger v. Superintendent McFinnis*, No. 06 Civ. 5652(LTS), 2004 WL 1367506, at *4 (S.D.N.Y. June 16, 2004); *Berry v. City of New York*, No. 00 Civ. 2834(RMB), 2002 WL 31045943, at *8 (S.D.N.Y. June 11, 2002). As such, the Second Circuit has held that a plaintiff's failure to exhaust all administrative remedies may be excused on the grounds of estoppel where the plaintiff was misled, threatened, or otherwise deterred

Not Reported in F.Supp.2d, 2008 WL 2263191 (S.D.N.Y.)

(Cite as: 2008 WL 2263191 (S.D.N.Y.))

from fulfilling the requisite procedures. *See* [Hemphill](#), 380 F.3d at 688-89; [Ziemba](#), 366 F.3d at 163-64.

Plaintiff claims that “the actions by prison staff inhibiting [Plaintiffs] exhaustion of his administrative remedies might estop the staff members from raising the defense of failure to exhaust said remedies.” (Pl.’s Opp. ¶ 6.) Defendants fail to further respond to this contention, other than to assert that they are, in fact, not estopped from arguing exhaustion. (Def.’s Reply Mem. at 4.)

*10 In light of Plaintiff’s failure to put forth any corroborating evidence, either direct or circumstantial, to support his claims that he suffered retaliation in the form of threats, harassment and mail tampering, discussed *supra*, the Court finds, even taking the evidence in the light most favorable to Plaintiff, that he has not put forth sufficient evidence to sustain his burden of demonstrating estoppel.

3. Plaintiff Has Not Shown the Existence of Special Circumstances

Finally, courts must consider whether any “special circumstances” exist to justify Plaintiff’s failure to comply with the administrative procedural requirements pursuant to the PLRA. *See* [Giano](#), 380 F.3d at 675; [Hemphill](#), 380 F.3d at 690. To determine whether “special circumstances” exist, a court must consider the “circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way.” [Giano](#), 380 F.3d at 678. Findings of special circumstances have been primarily established where plaintiffs acted pursuant to reasonable interpretations of the regulations, thus preventing exhaustion. For example, in *Hemphill*, the Court remanded the case to the district court to consider the plaintiff’s arguments that regulations were manifestly unclear and that he justifiably interpreted rules as permitting him to appeal directly to the Superintendent. 380 F.3d at 689.

Here, Plaintiff claims that he should be excused from exhausting such administrative procedural requirements due to “special circumstances,” and relies on *Giano* for the proposition that the plaintiff contended that the relevant DOCS Directive was unclear and that a reasonable person interpreting the rule would not have understood the requirements it put forth regarding the appropriate appeal

procedure. (Pl.’s Opp. ¶ 7.) Plaintiff, however, fails to put forth any further arguments to support to support his contention that “special circumstances” should be found to alleviate his failure to comply with the exhaustion requirement. Despite this omission, the Court must construe a *pro se* litigant’s pleadings liberally and read their claims as “rais[ing] the strongest arguments that they suggest.” [Burgos v. Hopkins](#), 14 F.3d 787, 790 (2d Cir.1994).

Therefore, even assuming Plaintiff misinterpreted the appeals process, Plaintiff’s contentions fail to demonstrate “special circumstances” that would justify Plaintiff’s failure to exhaust his administrative remedies. Plaintiff has failed to present any arguments regarding what he believed the appropriate procedural requirements to be. Moreover, unlike in *Giano*, Plaintiff did not take any affirmative steps to appeal the Superintendent’s decision based upon some erroneous, yet “reasonable,” interpretation of the grievance procedures. Rather, Plaintiff offers a wholly conclusory and vague assertion that “special circumstances” should excuse his non-compliance with the exhaustion requirements. *See* [Giano](#), 380 F.3d at 677-78. Therefore, without any evidence to demonstrate what Plaintiff’s alleged interpretation of the instructions for appeal was or any alternative efforts he undertook to appeal the claim based on such an interpretation, the Court finds that Plaintiff has failed to meet his burden under *Hemphill* of demonstrating “special circumstances.”

*11 Because none of the exceptions outlined in *Hemphill* apply to the facts of this case, the Court finds that Plaintiff has failed to satisfy the PLRA’s exhaustion requirement. Accordingly, Plaintiff’s claims are barred pursuant to [42 U.S.C. § 1997c\(a\)](#).^{FN7}

^{FN7} Following the completion of briefing on Defendants’ summary judgment motion, Plaintiff filed two motions: (1) a “motion to dismiss” Defendant’s summary judgment motion (filed on October 16, 2007); and (2) a motion for appointment of counsel (filed on December 19, 2007). Plaintiff’s motions are denied as moot, given the above findings of the Court

Not Reported in F.Supp.2d, 2008 WL 2263191 (S.D.N.Y.)

(Cite as: 2008 WL 2263191 (S.D.N.Y.))

V. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED. The Clerk of the Court is respectfully directed to enter judgment in favor of Defendants and to close this case.

SO ORDERED.

S.D.N.Y.,2008.

Winston v. Woodward

Not Reported in F.Supp.2d, 2008 WL 2263191
(S.D.N.Y.)

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Slip Copy, 2012 WL 4026840 (N.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,

N.D. New York.

Michael ATKINS, Plaintiff,

v.

D. MENARD, Sergeant, Clinton Corr. Facility; B. Hayes, Corr. Officer, Clinton Corr. Facility; Russell, Corr. Officer, Clinton Corr. Facility; L. Martin, Officer, Clinton Corr. Facility; Moak, Officer, Clinton Corr. Facility; Allen, Lieutenant, Clinton Corr. Facility; and John Does 1–4, Defendants.

No. 9:11–CV–0366 (GTS/DEP).

Sept. 12, 2012.

Michael Atkins, Rome, NY, pro se.

Hon. [Eric T. Schneiderman](#), Attorney General for the State of New York, [Christopher W. Hall, Esq.](#), Assistant Attorney General, of Counsel, Albany, NY, for Defendants.

MEMORANDUM–DECISION and ORDER

[GLENN T. SUDDABY](#), District Judge.

*1 Currently before the Court, in this *pro se* prisoner civil rights action filed by Michael Atkins (“Plaintiff”) against the ten above-captioned New York State correctional employees (“Defendants”), are the following: (1) Defendants’ motion for partial summary judgment seeking dismissal of Plaintiff’s failure-to-protect claim against Defendant Allen due to Plaintiff’s failure to exhaust his available administrative remedies before filing that claim (Dkt. No. 34); and (2) United States Magistrate Judge David E. Peebles’ Report–Recommendation recommending that Defendants’ motion be granted (Dkt. No. 41). No objections have been filed to the Report–Recommendation, and the deadline by which to do so has expired. For the reasons set forth below, the Report–Recommendation is accepted and adopted in its entirety, and Defendants’ motion is granted.

I. RELEVANT BACKGROUND

Generally, construed with the utmost of special liberality, Plaintiff’s Complaint alleges that, on July 18 and July 21, 2008, while Plaintiff was incarcerated at Clinton Correctional Facility, Defendants violated his rights under the Eighth Amendment by (1) using excessive force against him, and (2) failing to protect him from the use of excessive force. (*See generally* Dkt. No. 1, at ¶ 6.) For a more detailed recitation of the factual allegations giving rise to Plaintiff’s claims, the Court refers the reader to the Complaint in its entirety, and to Magistrate Judge Peebles’ Report–Recommendation, which accurately recites those factual allegations. (Dkt. No. 1; Dkt. No. 41, at Part 1.)

Generally, in their motion for partial summary judgment, Defendants argue that the Court should dismiss Plaintiff’s failure-to-protect claim against Defendant Allen due to Plaintiff’s failure to exhaust his available administrative remedies before filing that claim. (Dkt. No. 34.) More specifically, Defendants present evidence that (1) Plaintiff filed no grievance with respect to Defendant Allen’s alleged failure to protect him on July 21, 2008, and/or (2) Plaintiff appealed that grievance to the Superintendent and the Central Office Review Committee. (*Id.*)

Generally, in his response in opposition to Defendants’ motion, Plaintiff argues that (on July 22, 2008) he submitted a grievance with respect to incident on July 21, 2008, but that prison officials (other than Defendant Allen) thwarted the processing of that grievance through tampering with Plaintiff’s mail. (Dkt. No. 38.)

Generally, in his Report–Recommendation, Magistrate Judge Peebles recommends that Defendants’ motion for partial summary judgment be granted for the following two reasons: (1) Plaintiff’s assertion that he submitted a grievance regarding the incident on July 21, 2008, is neither notarized nor properly sworn pursuant to [28 U.S.C. § 1746](#); and (2) in any event, even if Plaintiff’s assertion had the force and effect of sworn testimony, it would be insufficient to create a genuine dispute of

Slip Copy, 2012 WL 4026840 (N.D.N.Y.)

(Cite as: 2012 WL 4026840 (N.D.N.Y.))

material fact due to the exception to the rule against making credibility determinations on motions for summary judgment, set forth in Jeffreys v. City of New York, 426 F.3d 549 (2d Cir.2005). (Dkt. No. 41, at Part III.B.)

II. APPLICABLE LEGAL STANDARDS

A. Standard of Review Governing a Report–Recommendation

*2 When a *specific* objection is made to a portion of a magistrate judge's report-recommendation, the Court subjects that portion of the report-recommendation to a *de novo* review. Fed.R.Civ.P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C). To be “specific,” the objection must, with particularity, “identify [1] the portions of the proposed findings, recommendations, or report to which it has an objection and [2] the basis for the objection.” N.D.N.Y. L.R. 72.1(c).^{FN1} When performing such a *de novo* review, “[t]he judge may ... receive further evidence....” 28 U.S.C. § 636(b)(1). However, a district court will ordinarily refuse to consider evidentiary material that could have been, but was not, presented to the magistrate judge in the first instance.^{FN2}

^{FN1}. See also Mario v. P & C Food Markets, Inc., 313 F.3d 758, 766 (2d Cir.2002) (“Although Mario filed objections to the magistrate's report and recommendation, the statement with respect to his Title VII claim was not specific enough to preserve this claim for review. The only reference made to the Title VII claim was one sentence on the last page of his objections, where he stated that it was error to deny his motion on the Title VII claim ‘[f]or the reasons set forth in Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment.’ This bare statement, devoid of any reference to specific findings or recommendations to which he objected and why, and unsupported by legal authority, was not sufficient to preserve the Title VII claim.”).

^{FN2}. See Paddington Partners v. Bouchard, 34 F.3d 1132, 1137–38 (2d Cir.1994) (“In objecting to a magistrate's report before the district court, a party has no right to present further testimony

when it offers no justification for not offering the testimony at the hearing before the magistrate.”) [internal quotation marks and citations omitted]; Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters, 894 F.2d 36, 40, n. 3 (2d Cir.1990) (district court did not abuse its discretion in denying plaintiff's request to present additional testimony where plaintiff “offered no justification for not offering the testimony at the hearing before the magistrate”); cf. U.S. v. Raddatz, 447 U.S. 667, 676, n. 3 (1980) (“We conclude that to construe § 636(b)(1) to require the district court to conduct a second hearing whenever either party objected to the magistrate's credibility findings would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts.”); Fed.R.Civ.P. 72(b), Advisory Committee Notes: 1983 Addition (“The term ‘*de novo*’ does not indicate that a secondary evidentiary hearing is required.”).

When only a *general* objection is made to a portion of a magistrate judge's report-recommendation, the Court subjects that portion of the report-recommendation to only a *clear error* review. Fed.R.Civ.P. 72(b)(2),(3); Fed.R.Civ.P. 72(b), Advisory Committee Notes: 1983 Addition.^{FN3} Similarly, when an objection merely reiterates the *same arguments* made by the objecting party in its original papers submitted to the magistrate judge, the Court subjects that portion of the report-recommendation challenged by those arguments to only a *clear error* review.^{FN4} Finally, when *no* objection is made to a portion of a report-recommendation, the Court subjects that portion of the report-recommendation to only a *clear error* review. Fed.R.Civ.P. 72(b), Advisory Committee Notes: 1983 Addition. When performing such a “clear error” review, “the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” *Id.* ^{FN5}

^{FN3}. See also Brown v. Peters, 95–CV–1641, 1997 WL 599355, at *2–3 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.) [collecting cases], *aff'd without opinion*, 175 F.3d 1007 (2d Cir.1999).

Slip Copy, 2012 WL 4026840 (N.D.N.Y.)

(Cite as: 2012 WL 4026840 (N.D.N.Y.))

FN4. See Mario, 313 F.3d at 766 (“Merely referring the court to previously filed papers or arguments does not constitute an adequate objection under either Fed.R.Civ.P. 72(b) or Local Civil Rule 72.3(a)(3).”); Camardo v. Gen. Motors Hourly-Rate Emp. Pension Plan, 806 F.Supp. 380, 382 (W.D.N.Y.1992) (explaining that court need not consider objections that merely constitute a “rehashing” of the same arguments and positions taken in original papers submitted to the magistrate judge); accord, Praileau v. Cnty. of Schenectady, 09-CV-0924, 2010 WL 3761902, at *1, n. 1 (N.D.N.Y. Sept. 20, 2010) (McAvoy, J.); Hickman ex rel. M.A.H. v. Astrue, 07-CV-1077, 2010 WL 2985968, at *3 & n. 3 (N.D.N.Y. July 27, 2010) (Mordue, C.J.); Almonte v. N.Y.S. Div. of Parole, 04-CV-0484, 2006 WL 149049, at *4 (N.D.N.Y. Jan. 18, 2006) (Sharpe, J.).

FN5. See also Batista v. Walker, 94-CV-2826, 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995) (Sotomayor, J.) (“I am permitted to adopt those sections of [a magistrate judge’s] report to which no specific objection is made, so long as those sections are not facially erroneous.”) (internal quotation marks and citations omitted).

After conducting the appropriate review, the Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b) (1)(C).

B. Standard of Review Governing a Motion for Summary Judgment

In his Report–Recommendation, Magistrate Judge Peebles accurately recites the legal standard governing motions for summary judgment. (Dkt. No. 34, at Part III.A.) As a result, this standard is incorporated by reference in this Decision and Order, which (again) is intended primarily for the review of the parties.

III. ANALYSIS

Because Plaintiff did not submit an objection to the Report–Recommendation, the Court reviews the Report–Recommendation only for clear error, as described

above in Section II.A. of this Decision and Order. After carefully reviewing the relevant filings in this action, the Court can find no clear error in the Report–Recommendation. Magistrate Judge Peebles employed the proper standards, accurately recited the facts, and reasonably applied the law to those facts. (Dkt. No. 34) As a result, Magistrate Judge Peebles’ Report–Recommendation recommending dismissal of Plaintiff’s failure-to-protect claim against Defendant Allen is accepted and adopted in its entirety for the reasons stated therein. (*Id.*) Indeed, Magistrate Judge Peebles’ thorough and correct Report–Recommendation would survive even a de novo review.

*3 The Court adds six brief points. First, as a threshold basis for adopting the Report–Recommendation, the Court relies on the fact that, despite having received adequate notice of the consequences of failing to properly oppose Defendants’ motion (*see* Dkt. No. 34), Plaintiff failed to file (1) a Response to Defendants’ Rule 7.1 Statement of Material Facts, and (2) an opposition memorandum of law. (*See generally* Dkt. No. 38.) FN6 As a result, (1) the properly supported factual assertions contained in Defendants’ Rule 7.1 Statement are deemed admitted by Plaintiff, and (2) the facially meritorious legal arguments contained in Defendants’ memorandum of law are deemed consented to by Plaintiff. Cusamano v. Sobek, 604 F.Supp.2d 416, 452–54 (N.D.N.Y.2009) (Report–Recommendation of Lowe, M.J., adopted by Suddaby, J.). These factual assertions and legal arguments clearly warrant the granting of partial summary judgment in Defendant Allen’s favor.

FN6. While Plaintiff has filed a document purporting to be a “statement of material facts,” that statement does not contain denials of the factual assertions contained in Defendants’ Rule 7.1 Statement in matching numbered paragraphs followed by citations to the record, as required by Local Rule 7.1(a)(3). (Dkt. No. 38, Attach.2.) The same is true with regard to the purported “affidavit” filed by Plaintiff. (Dkt. No. 38, at 2–3.) Moreover, while Plaintiff has filed a document purporting to be a “memorandum,” that document merely repeats the factual assertions contained in Plaintiff’s other submissions, and does not contain any legal

Slip Copy, 2012 WL 4026840 (N.D.N.Y.)

(Cite as: 2012 WL 4026840 (N.D.N.Y.))

arguments or citations to any legal authorities (or even a table of contents), as required by Local Rule 7.1(a)(1). (Dkt. No. 38, Attach.1.) Rather, that document purports to be certified, like a declaration. (*Id.*)

Second, in the alternative, even if the Court were to proceed to a sua sponte scouring of the record in search for a genuine dispute of material fact, the Court would find no such genuine dispute. The Court notes that Plaintiff's insertion of the note "[28 U.S.C. 1746](#)" beside his signature on various documents is not sufficient to transform those document into sworn declarations for purposes of a motion for summary judgment. (Dkt. No. 38, at 3; Dkt. No. 38, Part 1, at 1, 3.) *See also* [28 U.S.C. § 1746](#) (requiring that the certification state, in sum and substance, that "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)."). Moreover, although Plaintiff's form Complaint is sufficient sworn to pursuant to [28 U.S.C. § 1746](#), that Complaint makes no mention of having exhausted his administrative remedies with regard to his failure-to-protect claim against Defendant Allen. (Dkt. No. 1.) Moreover, even if the Complaint did make mention of such a fact, the Court would reject that assertion as patently incredible, for the same reasons that Magistrate Judge Peebles recommends such an assertion in Plaintiff's response papers, under [Jeffreys v. City of New York](#), 426 F.3d 549 (2d Cir.2005).

Third, even if Plaintiff had adduced admissible record evidence establishing that he submitted a grievance regarding Defendant Allen, Plaintiff has not adduced admissible record evidence that it was *Defendant Allen* (as opposed to some other correction officer) who interfered with the processing of that grievance. The Court notes that the second step of the Second Circuit's three-part exhaustion standard regards, in pertinent part, whether a defendant should be estopped from asserting failure to exhaust as a defense due to *his or her own* actions in preventing the exhaustion of plaintiff's remedies. "Generally, a defendant in an action may not be estopped from asserting the affirmative defense of failure to exhaust administrative remedies based on the actions (or inactions) of other individuals." [Murray v. Palmer](#), 03-CV-1010, 2010 WL 1235591, at *5 & n. 26 (N.D.N.Y. March 31, 2010) (Suddaby, J.) (collecting cases).^{FN7}

^{FN7}. *See also* [Taylor v. Thames](#), 09-CV-0072, 2010 WL 3614191, at *4 (N.D.N.Y. Sept. 8, 2010 ("[T]here is no allegation or argument that Defendant did anything to inhibit Plaintiff's exhaustion of remedies so as to estop Defendant from raising Plaintiff's failure to exhaust as a defense.")) (Suddaby, J.) (emphasis in original); [McCloud v. Tureglio](#), 07-CV-0650, 2008 WL 1772305, at *12 (N.D.N.Y. Apr. 15, 2008) (Report-Recommendation of Lowe, M.J., adopted by Mordue, C.J.) ("None of those documents allege facts plausibly suggesting that Defendant's own actions inhibited Plaintiff's exhaustion of remedies during the time in question.")).

*4 Fourth, even if Plaintiff had adduced admissible record evidence that Defendant Allen had interfered with the initial processing of his grievance, Plaintiff had the ability, and indeed the duty, to appeal the IGRC's nonresponse (to his grievance) to the next level, including CORC, to complete the grievance process. [7 N.Y.C.R.R. § 701.6\(g\)](#) ("[M]atters not decided within the time limits may be appealed to the next step."); *see also* [Murray](#), 2010 WL 1235591, at *2 & n. 4 [collecting cases].^{FN8} Here, there is no admissible record evidence establishing that he did so.

^{FN8}. The Court notes that there appears to be a conflict in case law regarding whether the IGRC's nonresponse must be appealed to the superintendent where the plaintiff's grievance was never assigned a grievance number. [Murray](#), 2010 WL 1235591, at *2 & n. 5 [citing cases]. After carefully reviewing this case law, the Court finds that the weight of authority appears to answer this question in the affirmative. *Id.* at *2 & n. 6 [citing cases].

Fifth, the Court rejects Plaintiff's attempt to raise the specter of a retaliation claim in his opposition to Defendants' motion for partial summary judgment as unduly prejudicial to Defendants, a gross waste of judicial resources, and a violation of both [Fed.R.Civ.P. 15\(a\)](#) and the Court's Pretrial Scheduling Order. *See* [Brown v.](#)

Slip Copy, 2012 WL 4026840 (N.D.N.Y.)

(Cite as: 2012 WL 4026840 (N.D.N.Y.))

Raimondo, 06–CV–0773, 2009 WL 799970, at *2, n. 2 (N.D.N.Y. March 25, 2009) (Report–Recommendation of Treece, M.J., adopted by Suddaby, J.) (“The Court notes that opposition papers [on summary judgment motions] are not the proper vehicle to instill new causes of action or add new defendants.”), *aff’d*, 373 F. App’x 93 (2d Cir.2010).^{FN9}

^{FN9}. See also Smith v. Greene, 06–CV–0505, 2011 WL 1097863, at *3, n. 5 (N.D.N.Y. Feb. 1, 2011) (Baxter, M.J.) (“[P]laintiff should not be allowed to assert any new claims at this stage of the case, particularly through his response to a summary judgment motion.”), adopted by, 2011 WL 1097862 (N.D.N.Y. March 22, 2011) (Suddaby, J.); Jackson v. Onondaga Cnty, 549 F.Supp.2d 204, 219–20 (N.D.N.Y.2008) (McAvoy, J., adopting Report–Recommendation of Lowe, M.J.) (finding that pro se civil rights plaintiff’s complaint should not be effectively amended by his new allegations presented in his response to defendants’ motion for summary judgment); Shaheen v. McIntyre, 05–CV–0173, 2007 WL 3274835, at *1, 9 (N.D.N.Y. Nov. 5, 2007) (McAvoy, J., adopting Report–Recommendation of Lowe, M.J.) (finding that pro se civil rights plaintiff’s complaint should not be effectively amended by his new allegations presented in his response to defendants’ motion for summary judgment); Harvey v. New York City Police Dep’t, 93–CV–7563, 1997 WL 292112, at *2 n. 2 (S.D.N.Y. June 3, 1997) (“To the extent plaintiff attempts to assert new claims in his opposition papers to defendants’ motion, entitled ‘Notice of Motions in Response and Opposing Defendant(s) Summary Judgment Motions,’ the Court finds that ‘it is inappropriate to raise new claims for the first time in submissions in opposition to summary judgment’ and accordingly disregards such claims.”) (citing Bonnie & Co. Fashions, Inc. v. Bankers Trust Co., 170 F.R.D. 111, 119 [S.D.N.Y.1997]).

Sixth, and finally, in future such motions, defense counsel is respectfully advised to (1) cite and apply

Second Circuit’s the Second Circuit’s three-part exhaustion standard (*see* Dkt. No. 41, at Part III.B.), and (2) serve the plaintiff with a copy of the Northern District’s “Notification to the Consequence of Failing to Respond to a Summary Judgment Motion” (*see* http://www.nyd.uscourts.gov/documents/Notification_Consequences_Failure_to_Respond_to_Summary_Judgment_Motion_FINAL_000.pdf) rather than defendants’ version of that notice.

ACCORDINGLY, it is

ORDERED that Magistrate Judge Peebles’ Report–Recommendation (Dkt. No. 41) is **ACCEPTED** and **ADOPTED** in its entirety; and it is further

ORDERED that Defendants’ motion for partial summary judgment (Dkt. No. 34) is **GRANTED**, such that Plaintiff’s failure-to-protect claim against Defendant Allen is **DISMISSED**, and the clerk is directed to terminate Defendant Allen from this action and that at the conclusion of this case that judgment be entered in Defendant Allen’s favor; and it is further

ORDERED that Pro Bono Counsel be appointed for the Plaintiff for purposes of trial only; any appeal shall remain the responsibility of the plaintiff alone unless a motion for appointment of counsel for an appeal is granted; and it is further

ORDERED that upon assignment of Pro Bono Counsel, a final pretrial conference with counsel will be scheduled in this action, at which time the Court will schedule for trial Plaintiff’s excessive force claim against Defendants Menard, Hayes, Russell, Martin and Moak. The parties are directed to appear at the final pretrial conference with settlement authority.

N.D.N.Y.,2012.

Atkins v. Menard
Slip Copy, 2012 WL 4026840 (N.D.N.Y.)
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